Supreme Court, U.S.
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No. 081393

In The

Supreme Court of the United States

STEPHEN EDWARD MAY,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition For Writ Of Certiorari To Division One Of The Court Of Appeals Of The State Of Arizona

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Patterson v. New York, 432 U.S. 197, 210 (1977), confirmed that "there are obviously constitutional limits beyond which the States may not go" when defining a crime's elements and its affirmative defenses. In Arizona, the State may convict an individual of child molestation by proving that he intentionally or knowingly touched the genitals of a child. Ariz. Rev. Stat. §§ 13-1401, 1410. To avoid being punished as a child molester, the defendant must raise and prove the affirmative defense that he "was not motivated by a sexual interest." Ariz. Rev. Stat. § 13-1407(E).

The question presented is whether Arizona's child molestation statutes violate an accused's Fourteenth Amendment right to due process because they "manipulate the prosecutor's burden of proof by . . . placing the affirmative defense label on 'at least some elements' of traditional crimes." *Apprendi v. New Jersey*, 530 U.S. 466, 475 (2000) (quoting *Patterson*, 432 U.S. at 210).

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Petitioner, Stephen E. May ("May"), respectfully requests that a writ of certiorari issue to review the decision of Division One of the Arizona Court of Appeals in this case.

OPINIONS BELOW

The Arizona Court of Appeals' decision (Pet. App. 1-11) is unreported. The judgment and order of the Superior Court of Maricopa County (Pet. App. 43, 53-54) is unreported.

STATEMENT OF JURISDICTION

The Arizona Court of Appeals issued its decision on July 24, 2008. The Arizona Supreme Court denied review on February 10, 2009. Petitioner invokes the Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which

> shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant provisions of Arizona law are set forth in the appendix to this petition at Pet. App. 27-31.

STATEMENT OF THE CASE

This case questions whether the "constitutional limits" restricting a state's ability to "reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in [its] statutes," *Patterson v. New York*, 432 U.S. 197, 210 (1977), prohibit Arizona from requiring a person prosecuted for child molestation to prove by a preponderance of the evidence that he "was not motivated by a sexual interest," Ariz. Rev. Stat. § 13-1407(E).

A. Arizona's Definition of the Crime of Molestation of a Child

Arizona defines the crime of child molestation as "intentionally or knowingly engaging in . . . sexual contact . . . with a child who is under fifteen years of age." Ariz. Rev. Stat. § 13-1410(A). "Sexual contact" does not require that the contact be accompanied by

any particular mental state or purpose. Rather, "'[s]exual contact' means any direct or indirect touching, fondling or manipulating of any part of the genitals [or] anus . . . by any part of the body or by any object." Ariz. Rev. Stat. § 13-1401(2). Thus, conviction requires the State to prove only that the defendant (1) intentionally or knowingly (2) touched the genitals (3) of a child less than fifteen years old.

The statutory scheme makes no exception for parental care, medical care, or other instances of legitimate touching. Instead, Arizona purports to separate innocent touching from criminal conduct by providing that "[i]t is a defense to a prosecution pursuant to § . . . 13-1410 that the defendant was not motivated by a sexual interest." Ariz. Rev. Stat. § 13-1407(E). Section 13-1407(E) is an affirmative defense. *See State v. Getz*, 944 P.2d 503, 506 (Ariz. 1997) (describing defenses in section 13-1407 as affirmative defenses); *State v. Simpson*, 173 P.3d 1027, 1030 (Ariz. Ct. App. 2007) (Pet. App. 19). In Arizona, a defendant bears the burden of proving affirmative defenses by a preponderance of the evidence. Ariz. Rev. Stat. § 13-205(A).

Throughout most of Arizona's history, the State had to prove beyond a reasonable doubt that an accused child molester acted with criminal sexual intent. *See State v. Trenary*, 290 P.2d 250, 252 (Ariz. 1955) (interpreting 1939 version of molestation statute to require proof of sexual interest). Similarly from 1965 until 1993, Arizona's Criminal Code defined the crime of child molestation as "knowingly

molest[ing] a child . . . by directly or indirectly touching the private parts of such child." *See* 1965 Ariz. Sess. Laws Ch. 20, §§ 3, 4. The Arizona Supreme Court held that the word "molest" placed in this version of the statute "[a]n essential element . . . that the acts involved be 'motivated by an unnatural or abnormal sexual interest or intent with respect to children.'" *State v. Brooks*, 586 P.2d 1270, 1272 (Ariz. 1978) (quoting *State v. Berry*, 419 P.2d 337, 340 (Ariz. 1966)); *accord State v. Stinson*, 461 P.2d 472, 473 (Ariz. 1969). In contrast, the current statute, passed in 1993, absolves the State of the need to prove the "essential element" acknowledged in *Trenary*, *Brooks*, *Berry*, and *Stinson* and instead requires the defendant to disprove the fact of sexual motivation to avoid conviction.

B. The Procedural History of May's Case

May was tried on seven counts of child molestation. (*See* Pet. App. 2.) Each count involved an allegation that May briefly and indirectly touched a child over clothing. (Record On Appeal 73.) May asked the court to instruct the jury that "[t]he crime of molestation of a child requires proof beyond a reasonable doubt" that he acted "with the motivation of a sexual interest." (Pet. App. 32-35.) During the jury instructions conference, May's counsel reiterated his position that "the State is obliged to prove a motivation of sexual interest as an element of the offense." (Pet. App. 38; *see also* Pet. App. 43.) The State answered that the law clearly places on May the burden to raise

and prove he was *not* motivated by sexual interest (Pet. App. 39-40), further noting that Arizona courts have upheld the constitutionality of requiring an accused to bear the burden of proof on affirmative defenses (Pet. App. 49-50 (citing *State v. Grell*, 135 P.3d 696, 702 (Ariz. 2006), and *State v. Sanderson*, 898 P.2d 483, 491 (Ariz. Ct. App. 1995))). More specifically, the State summarized its position by stating, "There is no element in the crime of child molestation regarding sexual motivation. Affirmative defenses are still viable in Arizona law; lack of sexual motivation is one of those defenses. The defendant constitutionally carries the burden of proving lack of sexual motivation by a preponderance of the evidence." (Pet. App. 51.)

The judge agreed with the State and issued final jury instructions that placed the burden of disproving sexual motivation on the defendant:

> MOLESTATION OF A CHILD
>
> The crime of molestation of a child requires proof that the defendant knowingly touched, directly or indirectly, the genitals of a child under the age of fifteen years. It is a defense to child molestation that the defendant was not motivated by a sexual interest.
>
> AFFIRMATIVE DEFENSE
>
> The defendant has raised the affirmative defense of lack of sexual motivation with respect to the charged offense of molestation of a child. The burden of proving each element of the offense beyond a reasonable doubt

> always remains on the State. However, the burden of proving the affirmative defense of lack of sexual motivation is on the defendant. The defendant must prove the affirmative defense of lack of sexual motivation by a preponderance of the evidence. If you find that the defendant has proved the affirmative defense of lack of sexual motivation by a preponderance of the evidence you must find the defendant not guilty of the offense of molestation of a child.

(Pet. App. 53-54.) After extensive deliberations, during which the jury twice told the judge they were deadlocked, the jury returned guilty verdicts on five counts. (Pet. App. 2-3.) May received five consecutive fifteen-year sentences for a total of seventy-five years. (Pet. App. 3.)

May appealed to the Arizona Court of Appeals, arguing, among other things, that the jury instructions impermissibly relieved the State of its burden to prove every element of the charged crimes beyond a reasonable doubt and thus violated the due process principle articulated in *In re Winship*, 397 U.S. 358, 364 (1970). (May's Ariz. Ct. App. Opening Br. 16.) The State asserted that the current version of the statute defining child molestation did not include the element of sexual motivation. (State's Ariz. Ct. App. Answering Br. 15-16); *see* Ariz. Rev. Stat. § 13-1410(A). Therefore, the State argued, it is not unconstitutional to require the defendant to prove the absence of sexual motivation as an affirmative defense. (State's Ariz. Ct. App. Answering Br. 16.)

The Arizona Court of Appeals held that the jury instruction complied with Arizona law, noting that May's argument was rejected by a recently published opinion, *State v. Simpson*, 173 P.3d 1027 (Pet. App. 12-23). (Pet. App. 4.) May petitioned the Arizona Supreme Court for review, again challenging the jury instructions that placed on him the burden to disprove motivation by sexual interest. (May's Ariz. Sup. Ct. Pet. for Review 6.) The Arizona Supreme Court denied review. (Pet. App. 24.)

REASONS FOR GRANTING THE WRIT

This case calls for this Court to resolve a question it has previously deferred: To what extent may the State remove traditional elements from existing crimes and instead require defendants to disprove those same elements as affirmative defenses? Arizona has always punished intentional touching of a child's genitals only upon proof of the "essential element" that the accused's acts were motivated by sexual interest. *See Brooks*, 586 P.2d at 1272. Because the current statutes require a defendant to disprove sexual interest, Arizona now authorizes criminal punishment for every intentional touching of a child's genitals, unless the accused can carry the burden to disprove his sexual intent. Under this scheme, May was given an effective natural life sentence without the State proving beyond a reasonable doubt the very fact that distinguishes innocent and criminal conduct.

The question presented implicates not only the child molestation statutes of four states,[1] but also the prerogative of all fifty states to alter, by legislative fiat, the burden of proof the Constitution imposes in criminal cases. State courts have already reached conflicting decisions regarding the states' authority to reduce the prosecution's burden in child molestation cases. *Compare State v. Tibbetts*, 281 N.W.2d 499, 500-01 (Minn. 1979) (statute requiring proof that touching "can reasonably be construed as being" for a sexual or aggressive purpose unconstitutionally shifted the burden of proof), *with In re Wentworth*, 651 N.W.2d 773, 776 (Mich. Ct. App. 2002) (statute requiring proof that touching "can reasonably be construed as being" for a sexual purpose *did not* unconstitutionally shift the burden of proof). Arizona's statutes present a narrowly focused, timely vehicle for examining the constitutional limits on the states' ability to redefine crimes and reallocate burdens of proof. *See* Sup. Ct. R. 10(c).

---

[1] Mich. Comp. Laws § 750.520a(q) (to establish "sexual contact" the State need prove only that the contact "can reasonably be construed as being" for a sexual purpose); Neb. Rev. Stat. § 28-318 (same); Tenn. Code Ann. § 39-13-501(6) (same).

A. The Court Should Define the Constitutional Limits Identified in *Patterson* Because Arizona Has Manipulated Its Statute So That the State No Longer Must Prove a Fact Necessary for Conviction.

The Constitution requires a state to "try[ ] to a jury all facts necessary to constitute a statutory offense, and prov[e] those facts beyond a reasonable doubt." *Apprendi*, 530 U.S. at 483-84; *In re Winship*, 397 U.S. at 364 ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Generally, in determining the necessary elements of a crime, courts defer to state legislatures because the states are "free to choose the elements that define their crimes." *Jones v. United States*, 526 U.S. 227, 241 (1999). "The caveat [is] a stated recognition of some limit upon state authority to reallocate the traditional burden of proof." *Id.* (citing *Patterson*, 432 U.S. at 210). But despite repeated assurances that constitutional limits exist on states' ability "to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes," this Court has left those limits undefined. *Patterson*, 432 U.S. at 210; *see Harris v. United States*, 536 U.S. 545, 557 (2002) (plurality opinion); *Apprendi*, 530 U.S. at 486; *Jones*, 526 U.S. at 241; *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986) (all acknowledging but not defining the limits identified in *Patterson*).

In *Apprendi*, the Court invalidated a so-called "sentencing enhancement" because the fact in question was "the functional equivalent of an element of a greater offense." 530 U.S. at 469, 494 & n.19. The Court noted that the statute at issue in that case did not present a question "concerning the State's power to manipulate the prosecutor's burden of proof . . . by placing the affirmative defense label on 'at least some elements' of traditional crimes." *Id.* at 475 (quoting *Patterson*, 432 U.S. at 210). The Court reaffirmed, however, that it has not "budge[d] from the position that . . . constitutional limits exist to states' authority to define away facts necessary to constitute a criminal offense." 530 U.S. at 486.

Although the Court has never said what would fall beyond the limits identified in *Patterson* and confirmed in *Apprendi*, there have been strong suggestions by members of the Court that call Arizona's child molestation statutes into constitutional question. Foremost, in *Apprendi*, Justice O'Connor criticized the rule announced by the majority, saying that New Jersey could easily evade that rule simply by restructuring the form of the statute. 530 U.S. at 541-42 (O'Connor, J., dissenting). Rejecting the dissent's charge that the opinion's rule could be easily evaded, the Court answered:

> [I]f New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not . . .), we would be

> required to question whether the revision was constitutional under this Court's prior decisions.

Apprendi, 530 U.S. at 490 n.16 (citing *Patterson*, 432 U.S. at 210, and *Mullaney v. Wilbur*, 421 U.S. 684, 698-702 (1975)). Arizona effected exactly the reversal the Court hypothesized in *Apprendi*: now Arizona's child molestation statutes "assum[e] a crime was performed with a [sexual interest] and then requir[e] a defendant to prove that it was not." *See id.*

In posing this hypothetical, the *Apprendi* majority echoed Justice Powell's dissent in *Patterson* that the majority had established an "indefensibly formalistic" rule that "allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime." *Patterson*, 432 U.S. at 223-24 (Powell, J., dissenting). In fact, Justice Powell presciently described another hypothetical, this one a murder statute, which he believed would be clearly unconstitutional, but would nevertheless comply with the formal requirements described by *Patterson*'s majority:

> [A] state statute could pass muster . . . if it defined murder as mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable mens rea. The State, in other words, could be

> relieved altogether of responsibility for proving anything regarding the defendant's state of mind . . . .

432 U.S. at 224 n.8; *see also id.* at 225 n.9. Arizona has done exactly what Justice Powell feared.

Perhaps inevitably, because *Patterson* left "no principled basis for concluding that such a statute falls outside the 'obvious' constitutional limits the Court invoke[d]," *id.* at 225 n.9, the Arizona legislature has drafted a statute that unilaterally declares those limits non-existent. The current version of the charging statute, Ariz. Rev. Stat. § 13-1410(A), reflects a wholesale revision that, with the deletion of the word "molests," removed from the statute the "essential element . . . that the acts involved be 'motivated by an unnatural or abnormal sexual interest or intent with respect to children.'" *Brooks*, 586 P.2d at 1272 (quoting *Berry*, 419 P.2d at 340); *see* 1993 Ariz. Sess. Laws Ch. 255, § 28. And, although sexual motivation is no longer labeled an element, the availability of the affirmative defense makes clear that criminal culpability continues to hinge on the presence or absence of that fact. Indeed, it is this element of *mens rea* that distinguishes innocent touching of children from touching that the State is trying to punish. *Cf. Patterson*, 432 U.S. at 211 n.13 ("It would be an abuse of affirmative defenses . . . if the purpose or effect were to unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with crime.")

(quoting *People v. Patterson,* 39 N.Y.2d 288, 305-07 (N.Y. 1976) (Breitel, C.J., concurring)).

The affirmative defense of lack of motivation by sexual interest is the tail that wags the dog of the offense of child molestation: *any* criminal punishment depends on the existence of that fact. *See McMillan*, 477 U.S. at 88 (upholding mandatory minimum statute because it gave "no impression of having [the operative sentencing factor] . . . be a tail which wags the dog of the substantive offense"). Over and again, this Court has suggested that such a statute would be unconstitutional. This case demonstrates the need to replace suggestion with certainty.

B. This Court Should Resolve the Tension Between *Apprendi* and *Patterson* So That States Can Discern When a Defendant May Bear the Burden of Proof Regarding Facts Necessary to Authorize Punishment.

The principal dissent in *Apprendi* pointed to a number of apparent inconsistencies created by the majority's holding, among them the tension between the legislative deference approved in *Patterson* and the more searching examination of a statute's function mandated by *Apprendi*. 530 U.S. at 545 (O'Connor, J., dissenting). Justice O'Connor, joined by Chief Justice Rehnquist and Justice Breyer, observed that "[t]he rule set forth in *Patterson* [is] 'that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of

the elements of the offense is usually dispositive.'" *Apprendi*, 530 U.S. at 534 (O'Connor, J., dissenting) (quoting *McMillan*, 477 U.S. at 85). In contrast, the "actual principle" of *Apprendi* is that "any fact . . . that has the effect, *in real terms*, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 543. Thus, Justice O'Connor found it "difficult to understand why the rule adopted by the Court in [*Apprendi*] . . . would not require the overruling of *Patterson*." *Id.* at 531.

Though Justice O'Connor was of the view that *Apprendi* and *Patterson* are wholly irreconcilable, both cases can be placed in the long line of cases in which the Court has either outlined or given content to the due process command that "the jury find beyond a reasonable doubt every fact necessary to constitute the crime." *Apprendi*, 530 U.S. at 499-500 (Scalia, J., concurring) (citing *In re Winship*, 397 U.S. at 364). In *Mullaney*, the Court held that a Maine statute impermissibly "shifted the burden of proof to the defendant" to negate the murder element of "malice aforethought" by requiring the defendant to prove he acted with "heat of passion on sudden provocation" to reduce the crime to manslaughter. 421 U.S. at 701, 705. The Court spoke in broad terms, rejecting the notion that *Winship* should be "limited to those facts that constitute a crime as defined by state law" because a "State could undermine many of the interests that decision sought to protect" merely by

"redefin[ing] the elements that constitute different crimes." *Id.* at 698.

Patterson upheld New York's murder statute against a challenge based on *Mullaney*, because, although the defendant had the burden to prove "extreme emotional disturbance" to reduce the crime from murder to manslaughter, "New York, unlike Maine, had not made malice aforethought, or any described *mens rea*, part of its statutory definition of second-degree murder." *Apprendi*, 530 U.S. at 485 n.12 (discussing *Mullaney* and *Patterson*). Deference to New York's definition of murder was warranted, the Court reasoned, because the prosecution must prove beyond a reasonable doubt only "the elements included in the definition of the offense" charged; New York remained free to create affirmative defenses and require the defendant to carry the burden on those defenses. *Patterson*, 432 U.S. at 210-11. Yet, the Court recognized that its deference to legislatures left open the door to states' amending criminal statutes to shift the burden of proof on some elements of existing crimes and assured that "there are obviously constitutional limits beyond which the States may not go in this regard." *Id.* at 210.

More than two decades later, *Apprendi* conclusively confirmed in one important regard the constitutional limits on the states' ability to manipulate burdens of proof: any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Apprendi, 530 U.S. at 490. Put differently, "all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring). That limit on legislative power has been aggressively enforced by this Court since *Apprendi*. *See Ring*, 536 U.S. at 609 (holding that aggravating factors "necessary for imposition of the death penalty" must be found by jury, not judge); *Blakely v. Washington*, 542 U.S. 296, 304-05 (2004) (invalidating Washington's sentencing scheme, which allowed judge-found facts to increase punishment); *United States v. Booker*, 543 U.S. 220, 243-44 (2005) (applying *Apprendi* and *Blakely* to the mandatory federal Sentencing Guidelines); *Cunningham v. California*, 549 U.S. 270, 293 (2007) (invalidating California's determinate sentencing scheme); *cf. Oregon v. Ice*, 555 U.S. ___, ___, 129 S. Ct. 711, 722 (2009) (Scalia, J., dissenting) ("The right to . . . proof beyond a reasonable doubt is a given, and all legislative policymaking – good and bad, heartless and compassionate – must work within the confines of that reality.").

Critically, however, *Apprendi*, *Ring*, *Blakely*, *Booker*, and *Cunningham* considered facts necessary to *increase the degree* of punishment. Those cases and all others have left the core question from *Mullaney* and *Patterson* unanswered: To what extent may states redefine crimes and reallocate burdens of proof

with regard to facts that authorize criminal punishment in the first place?

The Court must clarify this question because, as noted by Justice O'Connor in her *Apprendi* dissent, *Patterson* and *Apprendi* lead lower courts in different directions. Some courts have construed *Patterson* to mean *only* that a criminal statute may not require the defendant to negate an express element of the offense. *See, e.g.*, *United States v. Leal-Cruz*, 431 F.3d 667, 671 (9th Cir. 2005) (holding that due process "forbids shifting the burden . . . only where establishing the defense would necessarily negate an element"); *United States v. Kloess*, 251 F.3d 941, 947-48 (11th Cir. 2001) ("There is agreement, however, [that a]ny defense which tends to negate an *element* of the crime charged . . . must be *disproved* by the government."); *Davis v. Barber*, 853 F.2d 1418, 1421 (7th Cir. 1988) ("*Patterson* makes clear that a state may require a defendant to prove an affirmative defense provided it 'does not serve to negative any facts of the crime which the State is to prove in order to convict.'") (quoting *Patterson*, 530 U.S. at 207); *Wood v. Marshall*, 790 F.2d 548, 550 (6th Cir. 1986) ("If the defense does not bear upon an element of the crime, placing the burden of proof of the defense on the defendant does not violate his due process rights under *In Re Winship*, *Mullaney*, or *Patterson*.").

At the same time, *Apprendi* seems to reject *Patterson*'s extreme deference to legislatures, noting that "the relevant inquiry is one not of form, but of effect." 530 U.S. at 494; *see also Harris*, 536 U.S. at

557 (plurality opinion) ("Though defining criminal conduct is a task generally left to the legislative branch, . . . Congress may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt.") (internal quotation marks and citations omitted); *cf. Patterson*, 432 U.S. at 225 (Powell, J. dissenting) ("This decision simply leaves us without a conceptual framework for distinguishing abuses from legitimate legislative adjustments of the burden of persuasion in criminal cases."). Arizona's legislative legerdemain allows this Court to now determine where *Patterson* deference ends and the borders of *Apprendi*-land begin. *Cf. Ring*, 536 U.S. at 613 (Scalia, J., concurring).

C. State Courts Have Reached Conflicting Decisions Regarding the States' Authority to Tamper with the Prosecution's Burden of Proof in Child Molestation Cases.

Arizona's is not the only legislature to enact statutes that manipulate the prosecution's burden to prove sexual intent, beyond a reasonable doubt, in sexual molestation cases. Courts in these states, however, are split on the constitutionality of such statutes. *Cf. Jones*, 526 U.S. at 241-42 (noting that *Patterson*'s "stated recognition of some limit upon state authority to reallocate the traditional burden of

proof" remains open to "a narrow reading . . . [and] a broader reading").

For instance, explaining that its legislature had gone too far, the Minnesota Supreme Court relied on *Winship* and *Mullaney* to hold unconstitutional a jury instruction which, for conviction, required merely that the jury be "satisfied . . . that the touching could reasonably be construed as being for the purpose of satisfying the defendant's sexual impulses." *Tibbetts*, 281 N.W.2d at 500. The court concluded that the language of the instruction unconstitutionally shifted "the degree of proof . . . from acts which *must* be proved beyond a reasonable doubt to acts which *could* reasonably be construed or interpreted to be for an improper purpose." *Id.*; *accord State v. Nye*, 302 N.W.2d 83, 85-86 (Wis. Ct. App. 1981) (relying on *Tibbetts* and explaining that when the "legislature has chosen to make this a crime involving proof of specific intent . . . the legislature cannot then mandate that the specific intent can be proven by evidence which does not satisfy the reasonable doubt standard"), *aff'd* 312 N.W.2d 826 (Wis. 1981), *and abrogated on other grounds as recognized in State v. Shah*, 397 N.W.2d 492, 495 n.4 (Wis. Ct. App. 1986); *see also People v. West*, 724 P.2d 623, 628 (Colo. 1986) ("harmoniz[ing] the 'can reasonably be construed' language with those basic interests underlying the void-for-vagueness doctrine" by construing "sexual contact . . . to mean the intentional touching . . . for the purpose of sexual arousal, gratification, or abuse"). In reaching their decisions, these courts went beyond

the statutes' language and engaged in "an analysis that looks to the operation and effect of the law." *Mullaney*, 421 U.S. at 699 (citation omitted); *see also Apprendi*, 530 U.S. at 494.

Addressing a *Mullaney*-based challenge to a statute almost identical to the one at issue in *Tibbetts,* the Michigan Court of Appeals reached the opposite result. *In re Wentworth*, 651 N.W.2d at 776. The court reasoned that "the statute merely requires the prosecution to establish an intentional contact that could reasonably be construed as being for a sexual purpose." *Id.* (citing *People v. Piper*, 567 N.W.2d 483 (Mich. Ct. App. 1997)). In rejecting the defendant's argument that the statute impermissibly shifted the burden of proof, the court treated "the state legislature's definition of the elements of the offense . . . [as] dispositive," *McMillan*, 477 U.S. at 85 (stating *Patterson*'s rule). *See also Bryan v. State*, 745 P.2d 905, 909 (Wyo. 1987) (concluding that sexual or illicit intent was not an element of a sex offense because the statute required proof only "that a transgressor's acts be reasonably construed as for the purpose of abuse or gratification"); *cf. People v. Vigil*, 127 P.3d 916, 933-34 (Colo. 2006) (calling relevant part of *West* dicta and holding that sexual assault is a "general-intent crime," making voluntary intoxication unavailable as a defense); *State v. Osborn*, 490 N.W.2d 160, 167 (Neb. 1992) (noting that to prove "sexual contact" "the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such a purpose").

Like Michigan, Nebraska, Wyoming, and most recently Colorado, the Arizona Court of Appeals charted a highly deferential path in determining that Arizona Revised Statutes sections 13-1407(E) and 13-1410 properly required May to disprove that his actions were motivated by a sexual interest. (Pet. App. 4); *see Simpson*, 173 P.3d at 1029-30; (Pet. App. 18) (applying "clear and unambiguous" statutory language to hold that Section 13-1410 "does not require the State to prove . . . motivat[ion] by sexual interest"). Especially in light of *Apprendi*'s admonition that "the relevant inquiry is one not of form, but of effect," 530 U.S. at 494, resolving the constitutionality of Arizona's reallocation of the burden of proof on the critical fact of sexual motivation will give Arizona and its sister states much needed clarity on the appropriate level of deference to legislative definitions of crimes.

D. The Constitutional Question Raised Is of Surpassing Importance Because Arizona's Statutes Relieve the State of Its Burden to Prove the Very Fact That Justifies Punishment.

The question at issue here implicates constitutional protections that this Court has characterized as "of surpassing importance." *Apprendi*, 530 U.S. at 476. Indeed, "use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of criminal law. It is

critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *In re Winship*, 397 U.S. at 364. This concern is at its height "in a case . . . where the defendant is required to prove the critical fact in dispute" because the "result . . . is to increase further the likelihood of an erroneous . . . conviction." *Mullaney*, 421 U.S. at 701; *cf.* 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872) ("[A]n accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason.").

Moreover, the interests at the heart of the Constitution's demand for a higher standard of proof in criminal cases are magnified here because of the severe loss of liberty and powerful stigma attached to a child molestation conviction. *See In re Winship*, 397 U.S. at 363. Due process cannot allow the State to visit upon one of its citizens such dire consequences in the absence of proof beyond a reasonable doubt of the very fact – motivation by sexual interest – that makes child molestation so repugnant. *Cf. Apprendi*, 530 U.S. at 495 ("The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment."). By re-labeling the element of sexual interest as an

affirmative defense, Arizona allows an accused to be punished as a *sex* offender with no requirement that the State prove anything *sexual* about the accused's conduct.

CONCLUSION

Arizona has done with its definition of child molestation exactly what Justice Powell feared when he dissented in *Patterson*. 432 U.S. at 223-24 (Powell, J., dissenting). The Court in *Patterson* assured the States and defendants alike that there existed some undefined constitutional limits that would prevent legislative chicanery from circumventing due process. *Id.* at 210 (majority opinion). The Court's intervention is now needed to fulfill *Patterson*'s promise that these constitutional limits do in fact exist.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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2008 WL 2917111

Court of Appeals of Arizona,
Division 1, Department D.
STATE of Arizona, Appellee,
v.
Stephen Edward MAY, Appellant.
No. 1 CA-CR 07-0144.

July 24, 2008.

Review Denied Feb. 10, 2009.

Appeal from the Superior Court in Maricopa County; Cause No. CR2006-030290-001 SE; The Honorable Sherry K. Stephens, Judge. AFFIRMED.

Terry Goddard, Attorney General By Randall M. Howe, Chief Counsel, Criminal Appeals Section, Robert A. Walsh, Assistant Attorney General, Phoenix, Attorneys for Appellee.

Debus, Kazan & Westerhausen, Ltd., By Tracey Westerhausen, Phoenix, Attorneys for Appellant.

MEMORANDUM DECISION

JOHNSEN, Judge.

¶ 1 Stephen Edward May appeals his convictions and sentences imposed after a jury found him guilty of five counts of child molestation, all Class 2 felonies and dangerous crimes against children. May argues the superior court erred in instructing the jury that he had the burden of proving lack of sexual motivation as a defense to the alleged offenses. He also

contends the superior court erred when it allowed the jury to reconvene after first ordering a mistrial. May also asserts his sentences are excessive. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶ 2 May was tried on seven counts of child molestation. During deliberations, the jury twice notified the court that it was deadlocked. Upon the second notification, the court declared a mistrial. The court then thanked the jurors for their service and told them that the lawyers had indicated they might want to speak with them. "You are certainly under no obligation to do so," the court told the jury. "If you are willing to speak with the lawyers, I would ask that you wait back in the jury room and they will be in shortly." The court announced that the jury was excused and then observed, "The record will show the jury has left the courtroom." According to the record, approximately four minutes later, the court noted that some of the jurors had informed the bailiff that they did not want a "hung jury," and they asked to continue deliberations. The court asked counsel if there was an objection to granting the jury's request. The prosecutor and defense counsel both responded that they did not object.

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[1] We review the facts in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against May. *State v. Long*, 207 Ariz. 140, 142, ¶ 2, 83 P.3d 618, 620 (App.2004).

¶ 3 After several additional hours of deliberation, the jury returned guilty verdicts on five of the seven charges. May moved for a new trial, which the superior court denied. The court sentenced May to consecutive slightly mitigated 15-year terms for each conviction. After May's timely appeal, we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A)(1) (2001).

DISCUSSION

A. Defense of Lack of Sexual Motivation.

¶ 4 May first contends the superior court erred in instructing the jury that lack of sexual motivation is an affirmative defense that he was required to prove by a preponderance of evidence.[2] May argues the State should have the burden to prove beyond a reasonable doubt that he acted with the requisite sexual motivation.

¶ 5 Under A.R.S. § 13-1410(A) (2001), "[a] person commits molestation of a child by intentionally or knowingly engaging in . . . sexual contact . . . with a

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[2] For purposes of this decision, we assume, without deciding, that May was entitled to an affirmative defense instruction. *See State v. Gilfillan*, 196 Ariz. 396, 407, ¶ 40, 998 P.2d 1069, 1080 (App.2000) (defendant not entitled to self-defense instruction because he denied committing the act underlying his aggravated assault charge).

child under fifteen years of age." "'Sexual contact' means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body . . . " A.R.S. § 13-1401(2) (2001). Pursuant to A.R.S. § 13-1407(E) (Supp.2007), "[i]t is a defense to a prosecution pursuant to § 13-1404 or 13-1410 that defendant was not motivated by a sexual interest."[3]

¶ 6 We rejected May's argument in a recent opinion, *State v. Simpson,* 217 Ariz. 326, 173 P.3d 1027 (App.2007), in which we held that "[t]he 'sexual interest' provision of § 13-1407(E) is not an element of the offense of child molestation, but rather creates an affirmative defense regarding motive." *Id.* at 329, ¶ 19, 173 P.3d at 1030 (internal quotation and citation omitted). We see no reason why *Simpson* does not dispose of this issue.[4] The cases May cites do not persuade us otherwise. *State v. Brooks,* 120 Ariz. 458, 586 P.2d 1270 (1978), and *State v. Turrentine,* 152 Ariz. 61, 730 P.2d 238 (App.1986), both addressed a prior version of § 13-1410 that made it a crime to "knowingly molest[ ]" a child. *See* 1977 Ariz. Sess.

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[3] We cite a statute's current version when no changes material to this decision have occurred since the relevant date.

[4] The fact that we reviewed the purported trial error in *Simpson* under a fundamental error analysis does not mean the holding in *Simpson* does not apply here. We concluded in *Simpson* that the superior court's failure to *sua sponte* instruct the jury that the State had the burden to prove defendant's sexual motivation was not "error, fundamental or otherwise." *Simpson,* 217 Ariz. at 330, ¶ 23, 173 P.3d at 1031.

Laws, ch. 142, § 66 (1st Reg.Sess.) (amending and renumbering A.R.S. § 13-653 to § 13-1410); 1993 Ariz. Sess. Laws, ch. 255, § 29 (1st Reg.Sess.) (amending § 13-1410 to reflect its current version). Accordingly, the superior court did not abuse its discretion in instructing the jury that May had the burden to prove he was not motivated by sexual interest when he touched the victims' genitals through their clothes. *See State v. Johnson,* 212 Ariz. 425, 431, ¶ 15, 133 P.3d 735, 741 (2006) (denial of a requested jury instruction is reviewed for an abuse of discretion).

B. Continuing Jury Deliberations After Discharge.

¶ 7 May argues the superior court erred by allowing the jury to reconvene to continue deliberating after the court had declared a mistrial. We review only for fundamental error because May failed to object when the superior court reassembled the jury and permitted it to resume deliberating. *See State v. Velazquez,* 216 Ariz. 300, 309, ¶ 37, 166 P.3d 91, 100 (2007); *see also State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To obtain relief under fundamental error review, May must show that error occurred, the error was fundamental and that he was prejudiced thereby. *See id.* at 567, ¶ 20, 115 P.3d at 607.

¶ 8 The only Arizona case cited to us (or which we have found) in which a jury reconvened after having been discharged is *State v. Crumley,* 128 Ariz. 302,

305-06, 625 P.2d 891, 894-95 (1981). In that case, it was discovered "almost immediately" after the jury was discharged that trial on the issue of prior convictions had been overlooked. *Id.* at 305, 625 P.2d at 894. The bailiff in short order located six of the eight jurors. The other two were reached at their homes, and all eight returned the next day to take up the prior conviction issue. Under those circumstances, our supreme court said:

> Once discharged, we think this jury could not be properly recalled to further decide an issue of this case. It is simply too dangerous a practice to discharge the individual jurors from the duties and obligations of their oath, send them back into the community without admonitions or instructions, and then recall those same jurors to make a fair and impartial determination of any remaining issue connected with the case.

Id. at 306, 625 P.2d 891,625 P.2d at 895.

¶ 9 The facts in this case are different – the jury reconvened only a few minutes after having been discharged. Although nothing in the record tells us the jurors did not interact with the public in the meantime, the court had invited the jurors to gather again in the jury room. In any event, we know that they did not have the extended opportunity for contact with the public that occurred in *Crumley.*

¶ 10 Although the court in *Crumley* might have announced a rule that any verdict rendered after a jury once has been discharged is null and void, it did

not; instead, it reasoned that under the facts of that case, a verdict issued after the jury had been "sen[t] . . . back into the community without admonitions or instructions" could not stand.[5] We take from *Crumley,* therefore, that under Arizona law, structural error requiring reversal does not occur whenever a jury that has been discharged reconvenes and issues a guilty verdict. *See State v. Ring,* 204 Ariz. 534, 552, ¶ 45, 65 P.3d 915, 933 (2003) (when structural error occurs, conviction is automatically reversed); *Summers v. United States,* 11 F.2d 583, 586 (4th Cir.1926) ("the mere announcement of their discharge does not, before they have dispersed and mingled with the bystanders, preclude recalling" the jury); *Masters v. Florida,* 344 So.2d 616, 620 (Fla.App.1977) (burden on defendant to prove outside influence on jury during period of discharge). *But see Blevins v. Indiana,* 591 N.E.2d 562, 563 (Ind.App.1992) ("Any action of the jury after its discharge is null and void.");

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[5] The common-sense approach articulated in *Crumley* is like that taken by the court in *Washington v. Edwards,* 15 Wash.App. 848, 552 P.2d 1095 (Wash.App.1976). As here, the jury in that case was reconvened minutes after discharge. The court said, "A discharge will occur in fact when a jury is permitted to pass from the sterility of the court's control and allowed to separate or disperse and mingle with outsiders." Although the court noted that "contamination is presumed" when the discharged jury mingles with the public, it did not reverse the verdict because "the jury did not pass from the control of the court but merely exited the courtroom to the adjacent jury room," to which no member of the public had access. *Id.* at 850-51, 552 P.2d 1095.

Michigan v. Rushin, 37 Mich.App. 391, 194 N.W.2d 718, 721-22 (Mich.App.1971) (error to reconvene jury after it had left the courtroom, "be it for two minutes or two days"); *Tennessee v. Green,* 995 S.W.2d 591, 614 (Tenn.1998) (convictions vacated; jury may not be reconvened if it has been discharged and "outside contacts may have occurred") (internal quotation and citation omitted); *Melton v. Virginia,* 132 Va. 703, 111 S.E. 291, 294 (Va.1922) (reversing conviction: "[i]t is sufficient that the jury had left the presence of the court"); *cf. Arnold v. Alabama,* 639 So.2d 553, 554-55 (Ala.1993) (new trial granted when jury reconvened over defendant's objection; record did not disclose amount of time that elapsed between discharge and reconvening of jury or where jury was in the meantime).

¶ 11 May argues that we may presume that he was prejudiced when the jury was allowed to reconvene; at oral argument, for example, his counsel urged that we may take as common knowledge that jurors would reach for their cell phones to call friends or family immediately upon discharge. May points to nothing in the record that would demonstrate such prejudice, however, and, pursuant to *Henderson,* we will not presume prejudice when, by contrast to the facts in *Crumley,* the record does not disclose that the jury was "sen[t] back into the community" before reconvening. Accordingly, we may not reverse his conviction on this ground.

C. Sentencing Issues.

¶ 12 Finally, May argues the superior court abused its discretion in sentencing him to only "slightly mitigated" sentences because his "conduct was far milder than the usual child molest case." We find no abuse of discretion.

¶ 13 A superior court has broad discretion to determine the sentence to impose, and we will not disturb a sentence that is within statutory limits, as is May's, unless the court clearly abused its discretion. *State v. Cazares,* 205 Ariz. 425, 427, ¶ 6, 72 P.3d 355, 357 (App.2003). We will find an abuse of sentencing discretion only if the court acted arbitrarily or capriciously or failed to adequately investigate the facts relevant to sentencing. *Id.* Provided the superior court fully considers the factors relevant to imposing sentence, we generally will find no abuse of discretion, and the weight to be given any factor asserted in mitigation rests within the superior court's sound discretion. *See id.*

¶ 14 Prior to sentencing, the court announced it had considered the nature and circumstances of the offenses and May's contact with the victims, the position of trust May enjoyed with the victims' families, the ongoing relationship he had with them, the impact the offenses had on the victims and their families and the need to protect the community. In

mitigation,[6] the court considered May's social background, his physical impairment,[7] lack of criminal history, his extensive family and community support and the letters submitted on May's behalf. We discern no abuse of discretion in the court's imposition of consecutive 15-year prison sentences, two years less than the presumptive 17-year term for a single offense. *See* A.R.S. § 13-604.01(D) (Supp.2007).

¶ 15 May alternatively requests we exercise our authority under A.R.S. § 13-4037(B) (2001) to order that certain of his sentences run concurrent with each other, so as to effectively reduce his aggregate sentence by 30 years. A sentence that is within the statutory limits will not be reduced absent a showing that it was the result of "arbitrariness, capriciousness, or failure to conduct adequate investigation into facts relevant to sentencing." *State v. Ramos,* 133 Ariz. 4, 7, 648 P.2d 119, 122 (1982). Having determined the superior court properly considered the facts relevant to sentencing, we decline to order May's sentences to run concurrently in the manner he requests. *See State v. Fillmore,* 187 Ariz. 174, 185, 927 P.2d 1303, 1314 (App.1996) (court of appeals' statutory discretion to reduce excessive sentences must be exercised with great caution).

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[6] The State dismissed its allegation of aggravating circumstances prior to the sentencing hearing.

[7] May has a neurological condition that causes his head to uncontrollably "tick" and other physical manifestations.

¶ 16 Finally, May contends that the individual sentences for each count and his lengthy aggregate sentence constitute cruel and unusual punishment. As May concedes, he did not raise this argument below. Therefore, he has waived this issue and we need not address it. *See State v. Navarro,* 201 Ariz. 292, 298 n. 6, ¶ 22, 34 P.3d 971, 977 n. 6 (App.2001) (Eighth Amendment argument that was not raised before the trial court is waived on appeal). Even if we were to consider this argument, however, pursuant to *State v. Berger,* 212 Ariz. 473, 476, ¶¶ 15-16, 134 P.3d 378, 381 (2006), we would be compelled to conclude that his sentence is not grossly disproportionate to his crimes.

CONCLUSION

¶ 17 May's convictions and sentences are affirmed.

CONCURRING: JON W. THOMPSON and ANN A. SCOTT TIMMER, Judges.

173 P.3d 1027

Court of Appeals of Arizona,
Division 1, Department B.
STATE of Arizona, Appellee,
v.
Kelvin Thomas SIMPSON, Appellant.
No. 1 CA-CR 06-0748.

Dec. 18, 2007.

Terry Goddard, Attorney General By Randall M. Howe, Chief Counsel, Criminal Appeals Section and Michael O'Toole, Assistant Attorney General, Phoenix, Attorneys for Appellee.

Law Office of Treasure VanDreumel PLC By Treasure L. VanDreumel, Phoenix, Attorneys for Appellant.

OPINION

OROZCO, Judge.

¶ 1 Kelvin Thomas Simpson (Defendant) appeals from two counts of child molestation and two counts of attempted child molestation following a jury trial and from the sentences imposed. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶ 2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles,* 213 Ariz. 268, 270, ¶ 2, 141 P.3d 748, 750 (App.2006). On June

2, 2005, A.A., her twin sister, N.A., and their niece, F.A., were swimming in a pool at an apartment complex where the sisters lived. A young boy was also in the pool and the boy's mother was watching the children swim.

¶ 3 At the time of trial, all three girls were nine years old. A.A. testified that while swimming, a man, later identified as Defendant, grabbed her with his left hand while his right hand touched her twice on her vagina over her clothes. A.A. stated she was uncomfortable and tried to get away from him. She asked the boy to tell his mother about the incident. However, the boy was too young to understand what she was relating and the boy's mother did not speak English. Later, A.A. told her own mother what occurred.

¶ 4 F.A. testified at trial that while swimming in the pool, Defendant touched her on her thigh near her vagina. She also tried to tell the boy and his mother about it, but neither could understand her. However, when some friends came over to the pool, F.A. told them to tell her grandmother about the incident.

¶ 5 N.A. testified that when she was swimming with her sister and her niece, Defendant touched her "upper leg." She said that because she was bothered by the touch, she told her sister and her niece.

¶ 6 The twins' mother, F.F., and F.A.'s grandmother, testified at trial. She stated that when she returned home from the grocery store and walked by the pool, she saw Defendant in the pool with the girls. She

indicated she was concerned about the situation because she had seen Defendant staring at "little girls" and "wom[e]n" for "long periods of time."

¶ 7 F.F. testified that as she was putting her groceries away, a neighbor girl came by her apartment and said the boy's mother wanted to talk to her. After they spoke, F.F. took the children out of the pool and called the police. F.F. testified that she had previously instructed the girls that if anyone touched their private areas, they should tell someone.

¶ 8 A Phoenix Police Officer responded to the call at the victims' apartment complex. He testified the victims appeared upset. He indicated he spoke to the boy's mother who reported that Defendant "had looked at the children in a bad way." Defendant was arrested that day.

¶ 9 A few days after the incident, a Phoenix Police Detective interviewed the three children individually. The detective used a stuffed bear to assist the girls in identifying the body parts where Defendant had touched them. A.A. indicated Defendant had touched her on the vagina over her clothes. N.A. and F.A. indicated that Defendant had touched each of them on the crevice of the upper thigh near the vagina. The detective also interviewed the boy's mother who

reported she did not see Defendant touch the children.[1]

¶ 10 Defendant was indicted on two counts of child molestation (A.A.) and two counts of attempted child molestation (F.A. and N.A.), all class 3 dangerous crimes against children. The jury found him guilty on all counts. The court sentenced Defendant to the presumptive term of imprisonment of seventeen years on Count One and a mitigated term of imprisonment of ten years on Count Two,[2] the sentences to run consecutively. The court imposed lifetime probation on Counts Three and Four to begin after Defendant served the sentences on Counts One and Two. Defendant timely appealed. We have jurisdiction pursuant to

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[1] Defendant did not testify at trial. However, his defense was that the children were either mistaken about what occurred, they had reported it incorrectly or any contact by him was "inadvertent."

[2] The minute entry of September 1, 2006, erroneously states the term of imprisonment for Count Two was the presumptive term. However, based on the oral pronouncement by the trial court at the sentencing hearing, it is clear the court imposed a mitigated sentence as to Count Two. *See State v. Hanson,* 138 Ariz. 296, 304-05, 674 P.2d 850, 858-59 (App.1983) ("Where there is a discrepancy between the oral sentence and the written judgment, the oral pronouncement of sentence controls."). Pursuant, therefore, to A.R.S. § 13-604.01 (Supp.2006), we correct the minute entry to reflect the trial court's imposition of a *mitigated* sentence as to Count Two. *See State v. Vandever,* 211 Ariz. 206, 210, 119 P.3d 473, 477 (App.2005) (holding that this court must correct an inadvertent error in a sentencing minute entry); *see also State v. Stevens,* 173 Ariz. 494, 496, 844 P.2d 661, 663 (App.1992).

Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031, and -4033(A)(1) (2001).

DISCUSSION

¶ 11 On appeal, Defendant argues the trial court committed fundamental error in failing to fully instruct the jury on the requisite culpable mental states for child molestation and attempted child molestation. In particular, he claims the court was required to inform the jury that to convict him, the jury had to find that Defendant's actions were motivated by sexual interest pursuant to A.R.S. § 13-1407(E) (Supp.2006).

¶ 12 As Defendant did not object to the instructions given "and did not request any additional instruction, we review only for fundamental error." *State v. Garnica,* 209 Ariz. 96, 99, ¶ 15, 98 P.3d 207, 210 (App.2004). "To obtain relief under the fundamental error standard of review, [a defendant] must first prove error." *State v. Henderson,* 210 Ariz. 561, 568, ¶ 23, 115 P.3d 601, 608 (2005). The defendant must then show that the "error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id.* at ¶ 24, 115 P.3d 601. Finally, the defendant must "demonstrate that the error caused him prejudice." *Id.* at ¶ 26, 115 P.3d 601.

¶ 13 The jury was instructed according to the applicable statutes. Under A.R.S. § 13-1410(A) (2001), "[a]

person commits molestation of a child by intentionally or knowingly engaging in . . . sexual contact . . . with a child under fifteen years of age." Under A.R.S. § 13-1401(2) (2001), "'[s]exual contact' means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body. . . ." Under A.R.S. § 13-1001(A)(2) (2001), "[a] person commits attempt, if acting with the kind of culpability otherwise required for commission of an offense, such person . . . [i]ntentionally does . . . anything which, under the circumstances as such person believes them to be, is any step in a course of conduct planned to culminate in commission of an offense. . . ."

¶ 14 Pursuant to A.R.S. § 13-105(9)(a) (Supp.2006), "'[i]ntentionally' . . . means, with respect to a result or to conduct described by a statute defining an offense, that a person's objective is to cause that result or to engage in that conduct." Under A.R.S. § 13-105(9)(b), "'[k]nowingly' means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that his or her conduct is of that nature or that the circumstance exists."

¶ 15 Under A.R.S. § 13-1407(E), "[i]t is a defense to a prosecution pursuant to § 13-1404 or 13-1410 that defendant was not motivated by a sexual interest." Defendant claims the trial court should have *sua sponte* instructed the jurors that the State was

required to prove that Defendant's actions were motivated by sexual interest under A.R.S. § 13-1407(E). We disagree.

¶ 16 In construing a statute, "[w]e look primarily to the language of the statute itself and give effect to the statutory terms in accordance with their commonly accepted meanings." *State v. Reynolds,* 170 Ariz. 233, 234, 823 P.2d 681, 682 (1992). "If a statute's language is clear and unambiguous, the court will give it effect without resorting to other rules of statutory construction." *Id.*

¶ 17 The elements of the crime of child molestation are set forth in A.R.S. § 13-1410. *See In re Jerry C.,* 214 Ariz. 270, 273, ¶ 9, 151 P.3d 553, 556 (App.2007). The affirmative defenses applicable to specific sexual offenses in Chapter 14 are set forth in A.R.S. § 13-1407. *See State v. Getz,* 189 Ariz. 561, 564-65, 944 P.2d 503, 506-07 (1997).

¶ 18 The statutory elements under § 13-1410 are clear and unambiguous. The statute defining the crime of child molestation does not require the State to prove that Defendant's conduct was motivated by sexual interest under A.R.S. § 13-1407(E). Our supreme court has held that because defining crimes is a legislative function, "[c]ourts may not add elements to crimes defined by statute. . . ." *State v. Miranda,* 200 Ariz. 67, 69, ¶ 5, 22 P.3d 506, 508 (2001) (disorderly conduct statute does not require that one actually disturb the peace as an element of offense, but only requires commission of certain acts with intent

to disturb peace); *see also Getz,* 189 Ariz. at 563-66, 944 P.2d at 505-08 (where statute defining offense of sexual abuse under A.R.S. § 13-1404 is "plain on its face," it must be applied "as written" and any affirmative defense under § 13-1407 should not be "inject[ed]" into elements of the crime); *State v. Sandoval,* 175 Ariz. 343, 345-47, 857 P.2d 395, 397-99 (App.1993) (trial court erred in dismissing charges against defendant for indecent exposure on ground that defendant's actions had to be motivated by sexual interest where language of statute defining crime was unambiguous and did not include this as an element).

¶ 19 The "sexual interest" provision of § 13-1407(E) is not an element of the offense of child molestation, but rather "create[s] an affirmative defense regarding motive." *State v. Sanderson,* 182 Ariz. 534, 542, 898 P.2d 483, 491 (App.1995). Thus, "proving the existence of [sexual] motivation [is] not necessary to establish guilt of child molestation under the statute at issue." *Id.* Further, under A.R.S. § 13-205(A) (Supp.2006), "[e]xcept as otherwise provided by a law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence." *See State v. Farley,* 199 Ariz. 542, 544, ¶ 11, 19 P.3d 1258, 1260 (App.2001) (an affirmative defense is not an element of an offense but "is a matter of avoidance of culpability even if the State proves the offense beyond a reasonable doubt.").

¶ 20 Relying on *State v. Lujan,* 192 Ariz. 448, 451, ¶ 7, 967 P.2d 123, 126 (1998) and *Maricopa County*

Juv. Action No. JV-121430, 172 Ariz. 604, 606-07, 838 P.2d 1365, 1367-68 (App.1992), Defendant argues that the crime of child molestation not only requires that the defendant touch a child's private parts but also that the defendant be motivated by a sexual interest. In *JV-121430,* this court interpreted a prior version of A.R.S. § 13-1410 which made it a crime to "knowingly molest [ ] a child under the age of fourteen years by directly or indirectly touching the private parts of such child. . . ." 172 Ariz. at 606 n. 2, 838 P.2d at 1367 n. 2. Because the statute did not define "molest," a term which the court noted connoted sexual motivation, it clarified the requisite mental state for the crime of molestation.[3] Construing the term "molest" in light of certain statutory changes, including the enactment of A.R.S. § 13-1407(E), the court concluded "the intent necessary to commit the crime of molestation is . . . that the actor be motivated by a 'sexual interest.'". *Id.* at 606-07, 838 P.2d at 1367-68.

¶ 21 In *State v. Lujan,* the defendant was convicted of child molestation when he touched a child on her private parts while swimming in a pool. 192 Ariz. at 450-51, ¶¶ 2, 7, 967 P.2d at 125-26. Defendant claimed that although he had physical contact with

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[3] Courts interpreting this version of the child molestation statute required a showing of an "unnatural or abnormal sexual interest." *See, e.g., State v. Trenary,* 79 Ariz. 351, 354, 290 P.2d 250, 252 (1955); *Pima County Juv. Appeal No. 74802-2,* 164 Ariz. 25, 33-34, 790 P.2d 723, 731-32 (1990); *State v. Anderson,* 128 Ariz. 91, 92, 623 P.2d 1247, 1248 (App.1980).

the victim, he never touched her private parts. *Id.* at 451, ¶ 8, 967 P.2d at 126. Because the offense occurred in 1993, the defendant was convicted under a similar, but modified, version of A.R.S. § 13-1410, which made it a crime to "knowingly molest [ ] a child under the age of fifteen years by directly or indirectly touching private parts of such child. . . ." *Id.* at 451, ¶ 7, 967 P.2d at 126. Relying on *JV-121430* and A.R.S. § 13-1407(E), the Arizona Supreme Court, in dicta, similarly interpreted the "knowingly molests" language as requiring an additional finding that a defendant be motivated by a "sexual interest." *Lujan,* 192 Ariz. at 451, ¶ 7, 967 P.2d at 126.

¶ 22 Neither *JV-121430* nor *Lujan* construed the current version of A.R.S. § 13-1410, enacted in 1993, which differs from the previous version as the current version does not contain the language "knowingly molests." *See* 1993 Ariz. Sess. Laws, ch. 255, § 29. These cases are, therefore, not persuasive in construing the applicable version of the statute. Also, the current version of A.R.S. § 13-1410 makes molestation of a child a crime if a person "intentionally or knowingly engag[es] in . . . sexual contact . . . with a child under fifteen years of age." Nothing in either *JV-121430* or *Lujan* compels this court to interpret the A.R.S. § 13-1410, as amended, to require proof of "sexual interest" as an element of the offense.[4]

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[4] We should note that in the recent case of *In re James P.,* 214 Ariz. 420, 425, ¶¶ 21-22, 153 P.3d 1049, 1054 (App.2007), this court indicated that sexual motivation was an element of

(Continued on following page)

¶ 23 At trial, Defendant did not assert the affirmative defense that he was not motivated by sexual interest under A.R.S. § 13-1407(E) nor did he present evidence of this defense. Rather, his counsel argued during closing argument that if any touching occurred, it was accidental and defendant did not intentionally or knowingly engage in sexual contact with the children. *Cf. Sanderson,* 182 Ariz. at 542, 898 P.2d at 491 (where defendant was intoxicated when he inappropriately touched the private areas of two children, court found evidence of intoxication sufficient to raise defense that he was not motivated by a sexual interest and jury was so instructed). Because Defendant did not assert this defense, the trial court was not obliged to instruct the jury accordingly.[5] We find no error, fundamental or otherwise.

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child molestation. However, *James P.* addressed whether assault was a lesser-included offense of child molestation, pursuant to A.R.S. § 13-1203(A)(1) (2001), and did not address or attempt to define the elements of child molestation under A.R.S. § 13-1410.

[5] Defendant also contends that the detective who interviewed the children allegedly gave his opinion about what the child molestation statute stated. He alleges this testimony misstated the law and compounded the error. Defendant objected to the testimony and the court overruled the objection. Later, Defendant requested an instruction informing the jury not to consider the officer's interpretation of the law, but the court denied the request. On appeal, Defendant has not raised the issue that the failure to give a curative instruction was error. Furthermore, to the extent Defendant claims the detective's testimony was improper because he opined that mere touching of a child's private parts (regardless of sexual motivation)

(Continued on following page)

CONCLUSION

¶ 24 We have reviewed the issue raised by Defendant. For the foregoing reasons, we affirm his convictions and sentences. Furthermore, we correct the minute entry dated September 1, 2006 to reflect that Defendant was sentenced to a mitigated sentence as to Count Two.

CONCURRING: DANIEL A. BARKER, Presiding Judge and ANN A. SCOTT TIMMER, Judge.

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violates the statute, that argument fails for the reasons set forth above.

No. 2365

MINUTES
Arizona Supreme Court
Tuesday, February 10, 2009

CR-08-0281-PR **STATE OF ARIZONA**
(19) **v STEPHEN EDWARD MAY**

Court of Appeals Division One
1 CA-CR 07-0144

ORDERED: Petition for Review to the Arizona Supreme Court = DENIED

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, Appellee, v. STEPHEN EDWARD MAY, Appellant.	Arizona Supreme Court No. CR-08-0281-PR Court of Appeals Division One No. 1 CA-CR 07-0144 Maricopa County Superior Court No. CR2006-030290- 001 SE

ORDER

(Filed Mar. 27, 2009)

The Court has received Petitioner's Request for Permission for Reconsideration of an Order Denying Review, Petitioner's accompanying Motion for Reconsideration, Arizona Attorneys for Criminal Justice's Motion for Leave to Appear as Amicus Curiae, and the State's Response to Motion for Reconsideration and Motion to Strike Amicus Curiae Brief. Upon consideration,

IT IS ORDERED denying Petitioner's Request for Permission for Reconsideration of an Order Denying Review, and Arizona Attorneys for Criminal Justice's Motion for Leave to Appear as Amicus Curiae. The State's Motion to Strike is thus moot.

DATED this 27th day of March, 2009.

/s/ Rebecca W. Berch
REBECCA WHITE BERCH
Duty Justice

TO:

Robert A Walsh, Assistant Attorney General, Arizona Attorney General's Office

Tracey Westerhausen, Debus Kazan & Westerhausen LTD

Stephen Edward May, ADOC 214465, Arizona State Prison, Florence Eyman Complex-Meadows Unit

Jean-Jacques Cabou, Osborn Maledon PA

Gerard R O'Meara, Gust Rosenfeld PLC

Kathleen O'Meara, Osborn Maledon PA

Philip Urry, Clerk, Court of Appeals, Division One

mwa

A.R.S. § 13-205. Affirmative defenses; justification; burden of proof

A. Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence. Justification defenses under chapter 4 of this title are not affirmative defenses. Justification defenses describe conduct that, if not justified, would constitute an offense but, if justified, does not constitute criminal or wrongful conduct. If evidence of justification pursuant to chapter 4 of this title[1] is presented by the defendant, the state must prove beyond a reasonable doubt that the defendant did not act with justification.

B. This section does not affect the presumption contained in § 13-411, subsection C and § 13-503.

A.R.S. § 13-1401. Definitions

In this chapter, unless the context otherwise requires:

1. "Oral sexual contact" means oral contact with the penis, vulva or anus.

2. "Sexual contact" means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact.

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[1] Section 13-401 et seq.

3. "Sexual intercourse" means penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva.

4. "Spouse" means a person who is legally married and cohabiting.

5. "Without consent" includes any of the following:

(a) The victim is coerced by the immediate use or threatened use of force against a person or property.

(b) The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant. For purposes of this subdivision, "mental defect" means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.

(c) The victim is intentionally deceived as to the nature of the act.

(d) The victim is intentionally deceived to erroneously believe that the person is the victim's spouse.

A.R.S. § 13-1407. Defenses

A. It is a defense to a prosecution pursuant to §§ 13-1404 and 13-1405 involving a minor if the act was done in furtherance of lawful medical practice.

B. It is a defense to a prosecution pursuant to §§ 13-1404 and 13-1405 in which the victim's lack of consent is based on incapacity to consent because the victim was fifteen, sixteen or seventeen years of age if at the time the defendant engaged in the conduct constituting the offense the defendant did not know and could not reasonably have known the age of the victim.

C. It is a defense to a prosecution pursuant to § 13-1402, 13-1404, 13-1405 or 13-1406 if the act was done by a duly licensed physician or registered nurse or a person acting under the physician's or nurse's direction, or any other person who renders emergency care at the scene of an emergency occurrence, the act consisted of administering a recognized and lawful form of treatment that was reasonably adapted to promoting the physical or mental health of the patient and the treatment was administered in an emergency when the duly licensed physician or registered nurse or a person acting under the physician's or nurse's direction, or any other person rendering emergency care at the scene of an emergency occurrence, reasonably believed that no one competent to consent could be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

D. It is a defense to a prosecution pursuant to § 13-1404 or 13-1405 that the person was the spouse of the other person at the time of commission of the act. It is not a defense to a prosecution pursuant to § 13-1406 that the defendant was the spouse of the victim at the time of commission of the act.

E. It is a defense to a prosecution pursuant to § 13-1404 or 13-1410 that the defendant was not motivated by a sexual interest. It is a defense to a prosecution pursuant to § 13-1404 involving a victim under fifteen years of age that the defendant was not motivated by a sexual interest.

F. It is a defense to a prosecution pursuant to §§ 13-1405 and 13-3560 if the victim is fifteen, sixteen or seventeen years of age, the defendant is under nineteen years of age or attending high school and is no more than twenty-four months older than the victim and the conduct is consensual.

A.R.S. § 13-1410. Molestation of a child; classification

A. A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age.

B. Molestation of a child is a class 2 felony that is punishable pursuant to § 13-604.01.

PHILLIPS & ASSOCIATES, P.C.
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(602)288-1678

JOEL ERIK THOMPSON, S.B.A. No. 4079
Attorneys for Defendant.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	No. **CR2006-030290 -001 SE**
Plaintiff,	**DEFENDANT'S REQUESTED JURY INSTRUCTIONS** and **FORMS OF VERDICT**
v.	
STEPHEN MAY,	(Filed Jan. 8, 2007)
Defendant.	(Assigned to Hon. Sherry Stephens)

Defendant, STEPHEN MAY, through undersigned counsel, requests that the jury be given the following RAJI jury instructions, and Special Instructions Nos. 1 and 2:

Standard Criminal	5	(Presumption of Innocence – Reasonable Doubt)
Standard Criminal	8	(Character and Reputation of Defendant)
Standard Criminal	16	(Evidence of Any Kind)
Standard Criminal	18	(Credibility of Witnesses)

Standard Criminal 21 (Indictment is Not Evidence)
Standard Criminal 25 (Expert Testimony)
Standard Criminal 34 (Testimony of Law Enforcement Officers)
Standard Criminal 36 (Defendant's Testimony)

Defendant also requests the following Special Jury Instructions:

Standard Criminal 15 (Defendant Need Not Testify) – AS MODIFIED
Standard Criminal 35 (Separate Counts) – AS MODIFIED
Defendant's Requested Special Jury Instruction No. 1
Defendant's Requested Special Jury Instruction No. 2
Defendant's Requested Special Jury Instruction No. 3

Defendant also requests the following Forms of Verdict, to be used for each count.

RESPECTFULLY SUBMITTED this 8th day of January, 2007.

PHILLIPS & ASSOCIATES, P.C.

By /s/ Joel Erik Thompson
Joel Erik Thompson
Chief Trial Attorney
for the Firm
Certified as a Specialist in Criminal Law
By the Arizona Board of Legal Specialization

A copy of the foregoing
hand-delivered the above
date to:

The Hon. Sherry Stephens
Judge of the Superior
Court

John Beatty, Esq.
Deputy Maricopa County
Attorney for Plaintiff

By /s/ [Illegible]

DEFENDANT'S REQUESTED SPECIAL JURY INSTRUCTION NO. 3

MOLESTATION OF A CHILD

The crime of molestation of a child requires proof beyond a reasonable doubt that the defendant intentionally or knowingly, and with the motivation of a sexual interest, directly or indirectly touched, fondled or manipulated, any part of the genitals or anus of a child under fifteen years of age.

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. STEPHEN EDWARD MAY, Defendant.	COURT OF APPEALS DIVISION ONE NO. 1 CA-CR 07-0144 SUPERIOR COURT NO. CR 2006-030290- 001 SE

Mesa, Arizona
JANUARY 9, 2007

BEFORE: THE HONORABLE
SHERRY K. STEPHENS
Judge of the Superior Court

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Jury Trial)

REPORTED BY:
Dana D. Smith, RPR, CSR
Cert. No. 50566
Official Court Reporter

Prepared for Appeal

* * *

[70] Jury instructions. Let's go back in the chambers and do those. Do you want to bring your client or waive his presence?

MR. THOMPSON: We prefer to be with us.

One other question, and that is, there is indication that there may be difficulty bringing Detective

Quihuiz in. You indicated that you would permit a continuance for me to locate and get her here. I'm concerned about what that does with scheduling wise.

THE COURT: Mr. Beatty, do you have any detective back there to try to reach her to see if she is available?

MR. BEATTY: I don't. I have a phone number in my office, don't have it here. But I have her sergeant's phone number in my office.

THE COURT: Get those first and get my copies of the instructions and do those when you return.

MR. BEATTY: Thank you.

(Off the record 4:35 p.m. To 4:29 p.m.)

THE COURT: We're back on the record and discussing jury instructions.

Just to memorialize, we're going to remove character and representations of defendant as an instruction. Remove character and circumstantial evidence of six, all misconduct instruction.

The molestation of a child has been amended at the [71] request of defense counsel to read as follows: "The crime of molestation of a child requires proof that the defendant knowingly touched directly or indirectly the genitals of a child under the age of 15."

It's defense to child molesting. The defendant was not motivated by a sexual interest. The sexual

contact defense is omitted and the touching on clothing instruction is amended to read as follows: "In a prosecution for child molesting, the State need not prove that the defendant made direct contact with the genitals of the child, prove that the defendant touched the child's genital area through the child's outer clothing is sufficient."

The definition of genitals male will read private parts of a – sorry, genitals of a child of a male is penis, scrotum, testicles, and rectum. And genitals of female is female vagina, vulva, and rectum.

MR. THOMPSON: The rectum in both should be deleted.

THE COURT: Do you degree [sic].

MR. BEATTY: Yes, your Honor.

THE COURT: That's what I was asking earlier. All right.

MR. THOMPSON: Your Honor, if I could go back to the definition of molestation, I was under the impression that perhaps I didn't make my position clear or I didn't convince you, but my position is that the State is obliged to prove a [72] motivation of sexual interest as an element of the offense.

THE COURT: Right. And you're both going to bring me something to support your positions. Mr. Beatty wanted an opportunity to look at the 13-103 language and C and to provide some case law to the court on that issue. So with the exception of that part

of the molestation of a child instruction, do you agree with the instructions, Mr. Thompson?

MR. THOMPSON: Generally, and if I could make a short record on my position –

THE COURT: Sure.

MR. THOMPSON: – regarding the definition of molestation.

My reference is to the amended Senate Bill 1145, effective date April 24, '06, which, in effect, abolishes common law and affirmative defenses. In pertinent part, the amended Arizona Revised Statutes 13-103B states affirmative defense does not include any justification defense or defense that either denies an element of the offense charged or denies responsibility, including all by misidentification or lack of intent.

My view is that that establishes that there is no necessity remaining as there was under the previous circumstance where lack of intent would be an affirmative defense for the defendant to prove by a preponderance of the evidence that allegation. I believe that with the amendment to [73] the statute, the State is obliged to prove beyond a reasonable doubt that the defendant was motivated by sexual interest. I think that it is part of this obligation and part of the offense that's charged.

THE COURT: Okay. Mr. Beatty.

MR. BEATTY: I just wasn't aware that they were 1410, the statute that molestation had acquired

a new element, Judge. I need to call somebody. It certainly is not in my statute book there is a new element in that statute.

THE COURT: All right. I'll let you do that and talk about it tomorrow morning and try to start around ten o'clock if at all possible.

MR. BEATTY: I have got word that Investigator Quihuiz will be here at ten o'clock tomorrow.

THE COURT: Excellent, thank you.

(Whereupon, this proceeding was concluded at this time.)

[74] I, DANA D. SMITH, Official Court Reporter herein, do hereby certify that the foregoing pages are a true and correct transcript of the proceedings had in the above-entitled matter, all done to the best of my skill and ability.

DATED this 5th day of July, 2007.

/s/ _____
Official Court Reporter,
RPR, CSR No. 50566

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. STEPHEN EDWARD MAY, Defendant.	COURT OF APPEALS DIVISION ONE NO. 1 CA-CR 07-0144 SUPERIOR COURT NO. CR 2006-030290-001 SE

Mesa, Arizona
JANUARY 10, 2007

BEFORE: THE HONORABLE
SHERRY K. STEPHENS
Judge of the Superior Court

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Jury Trial)

REPORTED BY:

Dana D. Smith, RPR, CSR
Cert. No. 50566
Official Court Reporter

Prepared for Appeal

* * *

[99] THE COURT: I noted that one instruction missing is testimony that the defendant should be judged by the same standard as other witnesses. That needs to be added.

With respect to the issue – in terms of the child molestation instruction, I believe the instruction in

the packet is the appropriate one. I read Mr. Beatty's memoranda and received research from the Court's attorney. I believe that that instruction is appropriate. The issue, however, is whether, Mr. Thompson, you want the burden of proof instruction for affirmative defense that we discussed yesterday. You said yesterday that you did not want it.

MR. THOMPSON: I do not.

THE COURT: And you do not want it. So the record is clear, that instruction the defendant has raised is the affirmative defense of lack of sexual motivation with respect to the charges offenses, and you don't want that instruction; correct?

MR. THOMPSON: No.

MR. BEATTY: Judge, I also want to be clear on that too. That is the status of the law. If I happen to mention that in my closing, and then if Mr. Thompson tries to rebut that, I think it would be necessary to instruct them.

The broaching of the subject of an affirmative defense is on the defendant. The burden is on the defendant. Not just broach the subject, but prove it beyond a reasonable [100] doubt – or by a preponderance of the evidence.

Now, if I bring that up and I start arguing it, then he says no, that's not accurate, it's not here in the instructions, even though that is the correct status of the law. So I mean as long as we're not going

into that argument about burden of proof, that's fine. But –

THE COURT: Mr. Thompson, do you intend to argue that?

MR. THOMPSON: The problem is that we have a disagreement as to what the standard of proof is. I believe in a current state of 13-103, it is the State's burden to prove a lack of sexual motivation beyond a reasonable doubt.

MR. BEATTY: But that's not accurate of the law.

MR. THOMPSON: That's your position. I made my record.

MR. BEATTY: 13-205.

THE COURT: All right. Well, I have already ruled on that. So are you requesting that I give this instruction, Mr. Beatty?

MR. BEATTY: I think you should, Judge.

THE COURT: All right. Well, if you are going to be arguing lack of sexual motivation, which I believe you are.

MR. THOMPSON: Sure.

THE COURT: Then I'm going to give the instruction.

MR. THOMPSON: Okay.

THE COURT: You made your record that you object.

MR. THOMPSON: I made my record.

* * *

[167] I, DANA D. SMITH, Official Court Reporter herein, do hereby certify that the foregoing pages are a true and correct transcript of the proceedings had in the above-entitled matter, all done to the best of my skill and ability.

DATED this 9th day of July, 2007.

/s/ _____
Official Court Reporter,
RPR, CSR No. 50566

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Attorney for Plaintiff

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. STEPHEN EDWARD MAY (001), aka STEPHEN E. MAY, Defendant.	CR2006-030290-001 SE ___ STATE'S RESPONSE TO DEFENDANT'S PROPOSED JURY INSTRUCTIONS (Filed Jan. 12, 2007) (Honorable Sherry K. Stephens)

The State of Arizona, pursuant to A.R.S. §§13-1407(E), 13-1410 and 13-103, requests this Court to deny in part defendant's proposed jury instructions.

In this criminal case charging the defendant with multiple counts of Molestation of a Child, the defense has requested a jury instruction that tries to modify

the elements of the crime. The defense requests the instruction to include the additional element that the State must prove the defendant was motivated by a sexual interest. That request is not supported by Arizona law and should be denied.

The issue of sexual motivation is accounted for in Arizona law by statute (A.R.S. §13-1407(E)). It is an affirmative defense that must be raised and proved by a preponderance of the evidence by the defendant prior to any requirement that the State address the issue. The jury should be instructed as to the proper state of Arizona law, not a misreading and misleading interpretation of the law.

This Response is supported by the attached Memorandum.

Submitted January ___, 2007.

ANDREW P. THOMAS
MARICOPA COUNTY
ATTORNEY

By: /s/_____
/s/ John Beatty
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

Thus far in the trial, the defendant has not proven the defendant's lack of sexual motivation by a preponderance of the evidence. While questions to

several witnesses have broached the idea that sexual motivation might be a factor in this trial, a preponderance of the evidence has *not* shown that the defendant had no sexual motivation.

The issue of the lack of sexual motivation normally arises in circumstances where a physician examines a child for medical reasons or a parent bathes a child. The circumstances in this case are wholly different, as described in prior filings and in the testimony in trial.

The defendant now requests a jury instruction regarding lack of sexual motivation. However, he is claiming that the issue is not an affirmative defense, but rather is now effectively an element of the crime of Molestation. The Court will note that, as of today's date, A.R.S. §13-1410 has not been modified since sometime prior to the time when the first allegations in this case were said to have been committed.

LEGAL ARGUMENT

1. STATUTES

A. A.R.S. §13-103

The defense references A.R.S. §13-103 as support for his two claims: 1) that the affirmative defense of lack of sexual motivation no longer exists, and 2) that the State must prove the additional element of motivation by sexual interest. That reliance is misplaced. Affirmative defenses are alive and well in Arizona law, as described in A.R.S. §§13-205 and 13-1407.

A.R.S. §13-103 was added to Arizona law when the law changed over in 1978 (Laws 1977, Ch. 142, § 39, eff. Oct. 1, 1978). The original version abolished all common-law offenses, unless they were codified by statute or ordinance under the new Arizona legal system.

The statute was then amended 20 years later, on April 22, 1997 (Laws 1997, Ch. 136, §3), by adding the abolishment of common-law affirmative defenses. The language of that paragraph specifically excludes from abolishment any affirmative defense denying an element or denying responsibility (intent). In other words, any affirmative defense arguing lack of sexual motivation was not abolished by the 1997 amendment.

The statute was amended again in 2006 (Laws 2006, Ch. 199, §1, eff. Apr. 24, 2006). The effect of this amendment was to add to the specific exclusions from the definition of "affirmative defense." The additional exclusion in this amendment was justification under Chapter 4. Thus, the 2006 amendment is absolutely irrelevant to the case at bar.

B. A.R.S. §13-205

However, A.R.S. §13-205 was also amended by the 2006 Amendment. 13-205 is the affirmative defense statute, establishing the defendant's burden of proof. That statute was not eliminated, but only modified to erase the justification portion. The remainder of the statute remains in effect.

2. CASELAW

A. State v. Grell, 212 Ariz. 516, 135 P.3d 696 (2006)

In the *Grell* case, the defendant, not the State, was required to prove mental retardation. The burden of proof was likened to the burden of proof required for affirmative defenses. The Arizona court recognized that the U.S. "Supreme Court has held that a state may require that the defendant prove affirmative defenses [citations omitted]." (212 Ariz. at 522, 135 P.3d at 702.)

B. Garcia v. Browning, 213 Ariz. 598, 146 P.3d 1007 (App., Div. 2, 2006) (review granted Oct 23, 2006)

In *Garcia*, the Arizona Court of Appeals recognized the new amendment regarding affirmative defenses. However, that case dealt with a justification defense under Chapter 4, not the affirmative defense in 13-1407(E).

C. State v. Casey, 205 Ariz. 359, 71 P.3d 351 (2003) (cert. denied, 540 U.S. 1079)

In *Casey*, the Court discussed the issue of justification (specifically self-defense) as an affirmative defense that the defendant must prove by a preponderance of the evidence. The Court recognized that

the affirmative defense was *not* an element of the crime.

D. State v. Sanderson, 182 Ariz. 534, 898 P.2d 483 (App., Div. I, 1995) (review denied 1995)

In *Sanderson*, the defendant was accused of child molestation after the child said, *inter alia*, the defendant had touched her between the legs while sitting on the defendant's lap. The defendant argued that the statutes regarding his charges impermissibly shifted the burden because they required him to disprove an element of the charges (182 Ariz. at 541, 898 P.2d at 490). The Court found that the applicable statutes "created an affirmative defense regarding motive. This is constitutionally permissible [citations omitted]." (182 Ariz. at 542, 898 P.2d at 491). On the same page of the opinion, the Court went on to deny the argument that sexual motivation is an element of Molestation of a Child:

> We likewise reject the suggestion that the statutes, which contain no reference at all to a presumption, nevertheless create a presumption on the "element" of motivation by sexual interest. . . . Contrary to the defendant's implication, proving the existence of such motivation was not necessary to establish guilt of child molestation under the statute at issue [citations omitted].

CONCLUSION:

The defendant's relevant suggested forms of jury instruction are inappropriate and contrary to law. There is no element in the crime of child molestation regarding sexual motivation. Affirmative defenses are still viable in Arizona law; lack of sexual motivation is one of those defenses. The defendant constitutionally carries the burden of proving lack of sexual motivation by a preponderance of the evidence.

The requested jury instructions on this issue should be denied.

Submitted January ___, 2007.

ANDREW P. THOMAS
MARICOPA COUNTY
ATTORNEY

By: /s/ _____
/s/ John Beatty
Deputy County Attorney

Copy mailed\delivered
January ___, 2007, to:

The Honorable Sherry K. Stephens
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Deputy County Attorney

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA
CRIMINAL DIVISION

STATE OF ARIZONA, Plaintiff, v. STEPHEN MAY, Defendant.	)	CR 2006-030290-001-SE FINAL INSTRUCTIONS (Filed Jan. 10, 2007)

* * *

MOLESTATION OF A CHILD

The crime of molestation of a child requires proof that the defendant knowingly touched, directly or indirectly, the genitals of a child under the age of fifteen years. It is a defense to child molestation that the defendant was not motivated by a sexual interest.

AFFIRMATIVE DEFENSE

The defendant has raised the affirmative defense of lack of sexual motivation with respect to the charged offense of molestation of a child. The burden of proving each element of the offense beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of lack of sexual motivation is on the defendant. The defendant must prove the affirmative defense of lack

of sexual motivation by a preponderance of the evidence. If you find that the defendant has proved the affirmative defense of lack of sexual motivation by a preponderance of the evidence you must find the defendant not guilty of the offense of molestation of a child.

---

(2)

No. 08–1393

Supreme Court, U.S.
FILED
AUG 14 2009
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IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN EDWARD MAY,

Petitioner,

VS.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari to Division One of the Court of Appeals of the State of Arizona

BRIEF IN OPPOSITION

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QUESTION PRESENTED

During trial, in his opening and reply briefs to the Arizona Court of Appeals, and in his petition for review to the Arizona Supreme Court, Petitioner maintained that, contrary to state law, the jury instructions on the charged child-molestation offenses incorrectly identified "lack of sexual motivation" as an affirmative defense that he had to prove by a preponderance of the evidence. In an untimely motion for reconsideration of the Arizona Supreme Court's order denying his petition for review, Petitioner presented the new argument that the child-molestation statutes in effect when he committed his crimes unconstitutionally lowered the State's burden of proof by designating "lack of sexual motivation" an affirmative defense. The Arizona Supreme Court denied this motion, as well as the Arizona Attorneys for Criminal Justice's affiliated motion for leave to appear as *amicus curiae*. Petitioner now seeks a writ of certiorari from this Court to challenge the constitutionality of Arizona's child-molestation statutes under the Fourteenth Amendment's Due Process Clause.

Does this Court lack jurisdiction under 28 U.S.C. § 1257(a) to grant a writ of certiorari in this case? Alternatively, should this Court deny review because Petitioner's constitutional argument was neither pressed nor passed upon by the Arizona judiciary as a result of his failure to challenge Arizona's molestation statutes on Fourteenth Amendment grounds until he filed his untimely motion for reconsideration from the state supreme court's summary denial of discretionary review?

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OPINION BELOW

The Court of Appeals' memorandum decision, *State v. May*, 2008 WL 2917111 (Ariz. App. Jul. 24, 2008), is unreported. Pet. App. 1–11. The Arizona Supreme Court's order denying review without comment is also not reported. Pet. App. 24; Resp. App. 29a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The version of A.R.S. § 13–103 in effect at the time of Petitioner's offenses provided as follows:

> A. All common law offenses are hereby abolished. No conduct or omission constitutes an offense unless it is an offense under this title or under another statute or ordinance.
>
> B. For the purposes of this section, "affirmative defense" means a defense that is offered and that attempts to justify the criminal actions of the accused or another person for whose actions the

> accused may be deemed to be accountable. Affirmative defense does not include any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification or lack of intent.[1]

Arizona's child-molestation statute, A.R.S. § 13–1410, reads, in pertinent part, as follows:

> A. A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age.

A.R.S. § 13–105.10, which defines "intentionally" and "knowingly" as the "culpable mental state[s]" applicable to Arizona's criminal offenses, reads as follows:

> "Culpable mental state" means intentionally, knowingly, recklessly or with criminal negligence as those terms are defined in this paragraph:
>
> (a) "Intentionally" or "with the intent to" means, with respect to a result or to conduct described by a statute defining an offense, that a person's objective is to cause that result or to engage in that conduct.

---

[1] After Petitioner's commission of the charged offenses, but before his trial, the Arizona Legislature amended A.R.S. § 13–103(B) by substituting "excuse" for "justify." *See* 2006 Laws Ch. 199, § 2, effective April 24, 2006; Resp. App. 34a. The Arizona Supreme Court subsequently held that Senate Bill 1145, which included this amendment to A.R.S. § 13–103(B), lacked retroactive effect and would thus "apply only to offenses occurring on or after its effective date of April 24, 2006." *Garcia v. Browning*, 151 P.3d 533, 537, ¶ 20 (Ariz. 2007).

> (b) "Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person's conduct is of that nature or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission.

The version of A.R.S. § 13–205 in effect at the time of Petitioner's offenses provided as follows:

> A. Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence, including any justification defense under chapter 4 of this title.[2]
>
> B. This section does not affect the presumption contained in § 13–411, subsection C and § 13–503.

A.R.S. § 13–1401.2, which sets forth the statutory definition of "sexual contact," provides:

> "Sexual contact" means any direct or indirect

---

[2] After Petitioner committed the charged offenses, but before his trial, the Arizona Legislature amended A.R.S. § 13–205(A) by striking the text identifying justification defenses as affirmative defenses, and by requiring the prosecution to disprove beyond a reasonable doubt any justification defense that the defendant raised at trial. *See* 2006 Laws Ch. 199, § 2, effective April 24, 2006; Resp. App. 35a. Because the legislature did not give this statute retroactive effect, the post-April 24, 2006 version of A.R.S. § 13-205 that Petitioner appended to his brief, Pet. App. 27, is inapposite. *See Garcia*, 151 P.3d at 536-37, ¶¶ 14-21.

> touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact.

A.R.S. § 13–1407, the statute setting forth the "Defenses" available for the sexual offenses defined in Chapter 14 of Arizona's criminal code, reads, in pertinent part, as follows:

> E. It is a defense to a prosecution pursuant to § 13–1404 or 13–1410 that the defendant was not motivated by a sexual interest.

Arizona Rule of Criminal Procedure 16.1 provides, in pertinent part, as follows:

> a. Scope of rule. This rule shall govern the procedure to be followed in cases between arraignment and trial, unless specifically provided by another rule. Rules 16.1 and 16.2 shall apply to criminal proceedings in all courts.
>
> b. Making of motions before trial. All motions shall be made no later than 20 days prior to trial, or at such other time that the court may direct. . . .
>
> c. Effect of failure to make motions in timely manner. Any motion, defense, objection, request not timely raised under Rule 16.1(b) shall be precluded, unless the basis therefor was not then known, and by exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it.

Arizona Rule of Criminal Procedure 31.25, which governs the filing of *amicus* briefs on direct review, is lengthy and thus has been reproduced in the attached appendix. Resp. App. 36a-37a.

STATEMENT OF THE CASE

On February 15, 2006, the State charged Petitioner, Stephen Edward May, with eight counts of child molestation, class 2 felonies and dangerous crimes against children, in violation of A.R.S. §§ 13–1410 and –604.01. (P.I., Item 1.) The indictment alleged that Petitioner had committed these crimes between the dates of June 1, 2005, and September 30, 2005. (*Id.*) After the trial court granted Petitioner's motion to sever Count 8 from the other charges, Petitioner's trial on Counts 1 through 7 commenced on January 2, 2007. (*Id.*, Item 29; M.E., Items 43, 47.) The jury ultimately acquitted Petitioner on Counts 5 and 6, but convicted him of molesting three children no older than 9 years old—Luis A., Danielle A., and Taylor S.[3] (R.T. 1/3/07, at 47, 66, 113-14; M.E., Item 233.)

Luis testified at trial that Petitioner, then an aide at Taven Elementary school, molested him inside a classroom by slipping his left hand underneath Luis' desk and resting it on top of Luis' "private part" (penis) while helping Luis solve a computer problem. (R.T. 1/3/07, at 21-26, 33, 36-38, 40-44, 51-52; R.T. 1/4/07, at 7-9, 20.) Both Danielle and Taylor testified that Petitioner had manually touched their vaginas over their bathing suits on two separate occasions, at their apartment complex's swimming pool. (R.T. 1/3/07, at 70-77, 83-84, 100, 105-06, 116-25, 135-37; R.T. 1/4/07, at 109, 114; R.T. 1/8/07, at 83-85; R.T. 1/9/07, at 44-49, 54-55.) During pretrial interviews, Petitioner claimed not to remember Luis and denied even accidentally touching Danielle and Taylor's genitalia while in the swimming pool. (R.T. 1/8/07, at 89-90, 93.) During trial, however, Petitioner acknowledged the possibility that he might "have touched [Danielle and Taylor]

---

[3] The State dismissed Count 8 after Petitioner's trial. (R.T. 1/18/07, at 4-12.)

in the general areas of their genitals," but disavowed ever touching their vaginas intentionally, knowingly, or with any sexual motivation. (R.T. 1/10/07, at 39-41, 56.)

Petitioner requested a jury instruction that required the State to prove "beyond a reasonable doubt that [he] intentionally or knowingly, and with the motivation of a sexual interest, directly or indirectly touched . . . any part of the genitals . . . of a child under 15 years of age." Pet. App. 35. In support of his position that "the State [was] obligated to prove a motivation of sexual interest as an element of the offense," Pet. App. 38, Petitioner relied exclusively upon Senate Bill 1145's amendments to the statutory definition of "affirmative defense" set forth in A.R.S. § 13–103 (B):

> My reference is to the amended Senate Bill 1145,[4] effective date April 24, '06, which, in effect, abolishes common law and affirmative defenses. In pertinent part, the amended Arizona Revised Statutes 13–103B states [that an] affirmative defense does not include any justification defense or [a] defense that either denies an element of the offense charged or denies responsibility, including misidentification or lack of intent.
>
> My view is that that establishes that there is no necessity remaining as there was under the previous circumstance where lack of intent would be an affirmative defense for the defendant to prove by a preponderance of the evidence that allegation. I believe that with the amendment to the statute, the State is obliged to prove beyond a reasonable doubt

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[4] The appendix to this brief reproduces the pertinent text of SB 1145. Resp. App. 34a-35a.

> that the defendant was motivated by sexual interest. I think that is part of the offense that's charged.

Pet. App. 38-39.

The trial court deferred ruling on Petitioner's proposed instruction to afford the State time to respond. Pet. App. 39-40. The prosecutor ultimately opposed this instruction on three grounds: (1) A.R.S. § 13–1410 (A) did not include sexual motivation as an element of child molestation; (2) A.R.S. § 13–1407 (E) established "lack of sexual motivation" as an affirmative defense that A.R.S. § 13–205 (A) required Petitioner to prove by a preponderance of the evidence; and (3) the recent amendments to A.R.S. §§ 13–103 and –205(A) affected only the *justification* defenses set forth in Chapter 4 of Arizona's criminal code. Pet. App. 41-42, 45-51. Petitioner responded by reiterating his position that, under "the current state of [A.R.S. Section] 13–103, it is the state's burden to prove a lack of sexual motivation beyond a reasonable doubt." Pet. App. 43.

The trial court sustained the State's objection to Petitioner's submitted child-molestation instruction. Pet. App. 41-42. Because Petitioner intended to argue his lack of sexual motivation to the jury, Pet. App. 42-43, the trial court gave the following jury instructions, over his objection:

> The crime of molestation of a child requires proof that the defendant knowingly touched, directly or indirectly, the genitals of a child under the age of 15. It's a defense to child molestation that the defendant was not motivated by sexual interest.
>
> The defendant has raised the affirmative defense of lack of sexual motivation with respect to the charged offense of child molestation. The burden of

> proving each element of the offense beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of lack of sexual motivation is on the defendant. The defendant must prove the affirmative defense of lack of sexual motivation by a preponderance of the evidence. If you find that the defendant has proved the affirmative defense of lack of sexual motivation by a preponderance of the evidence, you must find the defendant not guilty of the offense of molestation of a child.

Pet. App. 53-54.

In his subsequent motion for a new trial, Petitioner alleged that this jury instruction incorrectly restated "the burden of proof and standard of proof . . . regarding the defense of sexual motivation or sexual interest." Resp. App. 2a. Once again, Petitioner relied exclusively upon "Senate Bill 1145" and "the most recent amendments to A.R.S. § 13–103" to argue that "the defense of lack of sexual motivation or sexual interest [] codified in A.R.S. § 13–1407 (E)" was no longer an affirmative defense that defendants had to prove. Resp. App. 2a-3a. Petitioner predicated this statutory-construction argument upon the legislature's substitution of the word "excuse" for "justify" in A.R.S. § 13–103(B), which redefined 'affirmative defense" as including only those defenses "that attempt[] to **EXCUSE** the criminal actions of the accused." Resp. App. 3a (emphasis in original.) Petitioner concluded that the court should have instructed the jury that the State had to prove his sexual motivation beyond a reasonable doubt because: (1) the lack of sexual motivation was a *justification* defense falling outside the amended statutory definition for "affirmative defense"; and (2) Petitioner's conduct was justified because he "acknowledged

the possibility of unintended or accidental touching" during the charged molestation incidents. *Id.*

Despite being afforded an opportunity to supplement his written arguments, Petitioner elected to "rest on the content of his motion [for new trial]." Resp. App. 6a. Thus, Petitioner never contended before the trial court that Arizona's child-molestation statutes violated the Fourteenth Amendment's Due Process Clause by requiring defendants to prove the non-existence of "sexual motivation" as an affirmative defense, pursuant to A.R.S. § 13–1407 (E).

Before the Arizona Court of Appeals, Petitioner likewise failed to challenge the constitutionality of Arizona's child-molestation statutes, A.R.S. §§ 13–1410 (A) and –1407(E). Instead, Petitioner relied upon these statutes to argue that the trial court's jury instructions contradicted the Arizona Legislature's alleged intent to assign the prosecution the burden of proving sexual motivation. Petitioner accordingly framed his opening brief's first issue as follows: "Isn't the defendant entitled to a new trial when *the trial judge* placed the burden on him to prove lack of sexual motivation?" Resp. App. 12a (emphasis added). Petitioner thereafter argued that "the *jury instructions* unconstitutionally placed the burden of proof on [him]," because the trial court allegedly misconstrued the type of defense that the Arizona Legislature intended to establish in A.R.S. § 13–1407 (E). Resp. App. 12a-15a (emphasis added).

Petitioner preliminarily noted the existence of two different types of defenses: (1) "affirmative defenses," which are "specifically recognized and defined by the legislature, must be raised by the defendant and can 'justify' or 'excuse' conduct that is otherwise criminal"; and (2) "legal defenses," which "go[] specifically to whether the prosecution has

carried its burden of proving each essential element to the crime—at least when specific intent is at issue." Resp. App. 12a-13a (quoting *United States v. Cameron*, 907 F.2d 1051, 1063 (C.A.11 1990)). Petitioner asserted that A.R.S. § 13–1407 (E) established a "legal defense" to an element of child molestation that the State needed to disprove beyond a reasonable doubt because: (1) this statute allowed defendants to "raise the defense that any touching of a child under the age of 15 was not sexually motivated," Resp. App. 13a-14a; and (2) Arizona "[c]ase law explains that sexual motivation constitutes a specific intent component of [child molestation], and is an essential element of it," Resp. App. 14a (citing *State v. Brooks*, 586 P.2d 1270 (Ariz. 1978), and *State v. Turrentine*, 730 P.2d 238 (Ariz. App. 1986)).

Petitioner next claimed that the Arizona Legislature manifested its intention to designate "lack of sexual motivation" a "legal defense" in two additional ways. First, Petitioner noted that A.R.S. § 13–1407 (E) labeled the "lack of sexual motivation" a "defense," not an "affirmative defense," and claimed that this "word choice" "illuminat[ed] the legislature's intent." Resp. App. 14a. Second, Petitioner contended that the defense of "lack of sexual motivation" fell outside A.R.S. § 13–103 (B)'s definition of "affirmative defense," which excluded "any defense that denies an element to the offense charged . . . including . . . *lack of intent*." (Emphasis added.) Characterizing "lack of sexual motivation" as a defense that alleged such a "lack of intent," Petitioner argued that A.R.S. § 13–103(B)'s text constituted "yet another illustration of . . . the legislative intent" not to classify "lack of sexual motivation" as an affirmative defense. Resp. App. 14a-15a.

After concluding that A.R.S. § 13–1407 (E) established a "legal defense," Petitioner asserted that this "distinction" between "affirmative" and "legal" defenses made a "big

[difference]" in his case because "A.R.S. § 13–205 applying as it does to only affirmative defenses, did not shift the burden of proof, by a preponderance or otherwise, to [him]." Resp. App. 15a. Petitioner consequently concluded, "This means that we are left with the cherished principle and constitutional due process right, imposing upon the state the burden to establish each element of the offense beyond a reasonable doubt." *Id.* (citing *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const. Amends. 5, 14; and Ariz. Const. Art 2, § 4). Accordingly, Petitioner argued that "the relief" to which he was entitled was not the invalidation of Arizona's molestation statutes, but rather "[a] new trial with instruction that the state must prove the presence of sexual motivation beyond a reasonable doubt." Resp. App. 16a.

After Petitioner filed his opening brief, the Arizona Court of Appeals issued an opinion in a different child-molestation case, wherein it held that the trial court was *not* required to instruct the jury that the State had to prove the defendant's sexual interest in child-molestation cases because: (1) A.R.S. § 13–1407 (E) established an affirmative defense that the defendant had to prove by a preponderance of the evidence; and (2) the Arizona cases that required proof of the defendant's "motivation by sexual interest" as an element of child molestation were "not persuasive" in construing "the current version of A.R.S. § 13–1410 enacted in 1993, which differs from the previous version as the current version does not contain the language 'knowingly molests.'" *State v. Simpson*, 173 P.3d 1027, 1029-31, ¶¶ 15-22 (Ariz. App. 2007).

In its answering brief, Respondent accordingly cited *Simpson* to refute Petitioner's contention that sexual motivation was an element of the current child-molestation statute, and thus maintained that the trial court's jury instructions properly allocated to Petitioner the burden of

proving the "lack of sexual motivation" affirmative defense by a preponderance of the evidence. Resp. App. 19a; Answering Brief, at 15-17.

In his reply brief, Petitioner did *not* argue that, if *Simpson* were correct, the Arizona Legislature had violated the Fourteenth Amendment's Due Process Clause by deleting "knowingly molests" from its current version of A.R.S. § 13–1410. Instead, Petitioner resorted to several rules of statutory construction to argue that the Arizona Legislature's true intent was to retain sexual motivation as an element of the current child-molestation statute:

> A key point that the State fails to address is that both the title of A.R.S. §13–1410.A and its contents refer to "molestation." The word choice formed the keystone of *State v. Brooks* and *State v. Turrentine*, where the statute in question used the word "molests." Oddly, the cases upon which the State relies fail to mention this fact. *It is important to remember that the legislature is presumed to know of the judicial interpretation of a statute and to approve it when it retains the same language in the statute after amendment. That principle applies here, so that the term "molestation" retains an element of sexual motivation.*

Resp. App. 20a-21a (footnotes omitted; emphasis added).[5]

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[5] Petitioner alternatively sought to distinguish *Simpson* on the ground that the defendant in that case had not "raise[d] the defense [of lack of sexual motivation], either legally or affirmatively," and classify its holdings as "*obiter dictum*." Resp. App. 19a.

On July 24, 2008, the Arizona Court of Appeals affirmed Petitioner's convictions in an unpublished memorandum decision. Pet. App. 1-11. The court first addressed Petitioner's argument that "the superior court erred in instructing the jury that lack of sexual motivation is an affirmative defense that he was required to prove by a preponderance of the evidence [because] the State should have the burden to prove beyond a reasonable doubt that he acted with the requisite sexual motivation." Pet. App. 3. Finding "no reason why *Simpson* does not dispose of this issue," the court held that "the superior court did not abuse its discretion in instructing the jury that [Petitioner] had the burden to prove he was not motivated by sexual interest when he touched the victims' genitals through their clothes." Pet. App. 4-5. Because Petitioner never alternatively challenged the constitutionality of Arizona's child-molestation statutes, the memorandum decision was silent on whether the Arizona Legislature's 1993 amendment to A.R.S. § 13–1410 (a) violated the Fourteenth Amendment. In fact, the court of appeals disposed of Petitioner's argument exclusively on statutory-construction grounds and consequently never referenced the federal constitution at all. *Id.*

In his petition for review to the Arizona Supreme Court, Petitioner once again failed to argue that Arizona's child-molestation statutes, as construed by *Simpson*, violated the Fourteenth Amendment's Due Process Clause. Instead, Petitioner claimed that the characterization of "the defenses in A.R.S. § 13–1407" as "affirmative defenses that the defendant, not the state must prove" was a "result . . . imposed by the *appellate courts*, *not* by *the legislature*." Resp. App. 24a (emphasis added). Petitioner consequently framed the issue on review as follows: "Did *the Court of Appeals* erroneously shift the burden of proof to the

defendant, to prove that he was not sexually motivated?" Resp. App. 25a (emphasis added). Petitioner thereafter resorted to several rules of statutory construction to challenge the court of appeals' determinations in *Simpson* and his own case that A.R.S. § 13–1407(E) established an "affirmative," as opposed to a "legal," defense. Resp. App. 26a-28a. Petitioner concluded that he was "entitled to a new trial, with the burden of proof properly allocated to the state, beyond a reasonable doubt." Resp. App. 28a. Petitioner, however, did *not* cite any federal cases or constitutional provisions in support of his request for review of the trial court's jury instructions, despite the fact that he expressly invoked "the state and federal constitutions" while framing the second issue that his petition for review presented to the Arizona Supreme Court.[6] Resp. App. 25a.

On February 10, 2009, the Arizona Supreme Court denied review summarily and without comment. Resp. App. 29a.

On March 24, 2009, Petitioner filed with the Arizona Supreme Court a "Motion for Reconsideration of Denial of Review." Resp. App. 30a-33a. For the first time ever, Petitioner challenged the constitutionality of the child-molestation statute:

> The child molestation statute violates due process because it relieves the state from proving every element of the charged crime beyond a reasonable doubt. First, the statute does this by making too many everyday and innocent acts fall

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[6] In his petition for review, Petitioner prefaced the second issue as follows: "Under the state and federal constitutions, a defendant is guaranteed a trial by a fair and impartial jury, including a jury free from taint by outside sources." Resp. App. 25a.

> within its definition of child molestation. Second, although the legislature has broad authority to define the elements of a crime, it may not lower the state's burden of proof by calling an "element" something else.

Resp. App. 32a (citing *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000)).

In concert with Petitioner, the Arizona Attorneys for Criminal Justice ("AACJ") lodged with the Arizona Supreme Court a simultaneously-filed motion for leave to appear as *Amicus Curiae*, to which AACJ's attorneys attached a proposed *amicus* brief, which raised the arguments presented in the pending petition for certiorari. Pet. App. 25-26; Resp. App. 30a-32a. The State opposed all of these motions and also moved the Arizona Supreme Court to strike the *amicus* brief. Pet. App. 25.

On March 27, 2009, the Arizona Supreme Court summarily denied Petitioner's motion for reconsideration and AACJ's request for leave to appear as *amicus curiae*. *Id.* The Court therefore deemed the State's motion to strike as "moot." *Id.*

In recapitulation, Petitioner's sole contention in state court—until his untimely motion for reconsideration of the Arizona Supreme Court's denial of review—was that the trial court's jury instructions conflicted with the Arizona Legislature's true intention to require the State to bear the burden of proof regarding his sexual interest. While advancing this statutory-construction argument before all three tiers of the state judiciary, Petitioner not only eschewed attacking the constitutionality of Arizona's molestation statutes, he *expressly relied upon* the very statutes challenged here to buttress his position that the lower courts had

misidentified the defendant as the party to whom the Arizona Legislature had actually intended to assign the burden of proof regarding his sexual motivation. Pet. App. 38-39, 41-42; Resp. App. 2a-4a, 10a-16a, 19a- 21a, 23a-24a, 26a-28a.

REASONS FOR DENYING THE WRIT

Petitioner's Fourteenth Amendment Due Process challenge to Arizona's child-molestation statutes was neither addressed by, nor properly presented to, the Arizona Court of Appeals. Consequently, this Court lacks jurisdiction to grant the requested writ under 28 U.S.C. § 1257(a). Alternatively, this Court, as one of final review and not of first view, should deny the writ because granting review would render this Court the first to consider the constitutionality of Arizona's child-molestation laws, despite the hallowed principle of federal-state comity. Moreover, Petitioner's reliance on this Court's Sixth Amendment jury-trial jurisprudence is inapposite. Finally, granting a writ in this case will not resolve the particular conflict identified in the pending petition because the cases cited by Petitioner involve differently-worded statutory definitions and do not address the precise federal due process claim that Petitioner raises in his pending petition.

I. PETITIONER DID NOT PROPERLY RAISE HIS CONSTITUTIONAL CHALLENGE TO ARIZONA'S CHILD-MOLESTATION STATUTES IN STATE COURTS.

First, this Court simply lacks jurisdiction under 28 U.S.C. § 1257(a) to grant the requested writ of certiorari because Petitioner's Fourteenth Amendment Due Process challenge to Arizona's child-molestation statutes was neither pressed nor passed upon by the Arizona Court of Appeals. "Under that statute and its predecessors, this Court has almost

unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that had rendered the decision [it] ha[s] been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997), and citing *Illinois v. Gates*, 462 U.S. 213, 218 (1983)). *Accord Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (collecting cases). Based on this jurisdictional deficiency alone, this Court should decline review.

Lack of jurisdiction aside, the requested writ should be denied because granting review would render this Court the very first to address Petitioner's belated constitutional challenge to A.R.S. §§ 13–1410 and –1407(E), a posture that would contradict this Court's most recent and increasingly frequent explanations for refusing to address issues not decided by any lower court: "[t]his Court . . . is one of final review, 'not of first view.'" *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1819 (2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). *Accord Montejo v. Louisiana*, 129 S.Ct. 2079, 2092 (2009) (same); *Pacific Bell Tel. Co. v. Linkline Communications, Inc.*, 129 S.Ct. 1109, 1123 (2009) (same). Indeed, "it is the settled practice of this Court, in the exercise of its appellate jurisdiction, that in only exceptional cases, and then only in cases coming from federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987) (quoting *McGoldrick v. Compagnie Generale Atlantique*, 309 U.S. 430, 434 (1940)).

The principle of federal-state comity further compels the conclusion that Petitioner should not be permitted to challenge the state-court judgment against him with a new claim that he *never* presented properly to the state judiciary

first.[7] "Under our federal system, the federal and state courts are equally bound to guard and protect rights secured by the Constitution." *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (quoting *Ex parte Royall*, 117 U.S. 241, 251 (1886)). "Comity . . . dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." *Williams v. Taylor*, 529 U.S. 420, 437 (2000) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999)). Thus, this Court should decline Petitioner's invitation to consider the federal constitutional question that he never properly presented to Arizona's courts, for "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams*, 520 U.S. at 90 (quoting *Webb v. Webb*, 451 U.S. 493, 500 (1981) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)). *Accord Bankers Life & Casualty Co.*, 486 U.S. at 79 (same).

The doctrine of state-federal comity applies with its greatest force in this case because Petitioner seeks certiorari to invalidate Arizona's child-molestation statutes on a federal constitutional ground never properly raised in state court. "Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires

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[7] *See Campbell v. Louisiana*, 523 U.S. 392, 403 (1998) ("With 'very rare exceptions' . . . we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision that we have been asked to review.") (quoting *Adams*, 520 U.S. at 86); *Clark v. Jeter*, 486 U.S. 456, 458 (1988) ("It is our practice, when reviewing decisions by state courts, not to decide federal claims that were not 'pressed or passed upon below.'") (quoting *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988)).

[it] to decline to consider and decide questions affecting the validity of state statutes not urged or considered there." *McGoldrick*, 309 U.S. at 434. *See also Monks v. New Jersey*, 398 U.S. 71 (1970); *Slagle v. Ohio*, 366 U.S. 259, 264 (1961). By failing to properly present his federal due-process challenge to Arizona's molestation statutes to the state courts, Petitioner frustrated the following important policies underlying the doctrine of federal-state comity:

> (1) Giving state courts the opportunity to address federal claims by implementing "a number of less intrusive, and possibly, more appropriate, resolutions," *Bankers Life & Casualty Co.*, 486 U.S. at 79-80, including resorting to "independent and adequate state grounds that would pretermit the federal issue." *Webb*, 451 U.S. at 500. *See also Adams*, 520 U.S. at 90; *Gates*, 462 U.S. at 222.
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> (2) Allowing "state courts to exercise their authority, which federal courts, including this [Court], do not have to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges." *Webb*, 451 U.S. at 500. *See also Cardinale*, 394 U.S. at 439.
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> (3) Affording state courts the opportunity to address a federal claim's merits in a reasoned opinion, the generation of which would beneficially expound the state-law provisions at issue and create an adequate legal record that would obviate the need for this Court to engage in labor-intensive plenary review. *See Adams*, 520 U.S. at 91; *Bankers Life & Casualty Co.*, 486 U.S. at 79-80; *Webb*, 451 U.S. at 500-01.

Because the Arizona Court of Appeals' memorandum decision was silent on the constitutionality of Arizona's child-molestation statutes under the Fourteenth Amendment's Due Process Clause, longstanding precedent requires Petitioner to overcome the presumption that the state court's failure to address this federal question was attributable to his own failure to present it in timely, procedurally proper fashion.[8] This burden Petitioner cannot carry.

Petitioner's motion for reconsideration of the Arizona Supreme Court's order denying review constituted the sole time in state court that he ever explicitly argued that Arizona's child molestation statutes violated due process by relieving the state of its burden to prove every element of this crime beyond a reasonable doubt. Resp. App. 32a. Petitioner's motion for reconsideration, however, did not properly present this federal question to the Arizona judiciary.

First, the Arizona Supreme Court has deemed waived claims that the defendant failed to first raise in the lower courts. *See State v. Sepahi*, 78 P.3d 732, 735, ¶ 19 n.3 (Ariz. 2003) ("This issue was not raised either in the superior court or the court of appeals, and therefore was not preserved for our review."); *State v. Tankersley*, 956 P.2d 486, 498, ¶ 48 (Ariz. 1998) ("Because he did not assert this argument in the

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[8] *See Adams*, 520 U.S. at 86-87 ("When 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'") (quoting *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 547, 550 (1987)); *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185 (1945) ("It is essential to our jurisdiction on appeal under [§ 1257's predecessor statute] that there be explicit and timely insistence in the state courts, as applied, is repugnant to the federal Constitution, treaties, or laws.").

trial court, however, the issue is waived."); *State v. Spreitz*, 945 P.2d 1260, 1276 (Ariz. 1997) (finding defendant's due-process claim not raised below to be waived).[9]

Moreover, Petitioner's motion for reconsideration did not fairly present the pending due-process challenge to the state courts because he raised this claim, for the first time ever, before the Arizona Supreme Court, a court of a discretionary review in non-capital cases. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989) (holding that the submission of a new claim to a State's highest court on discretionary review does not constitute fair presentation); *Swoopes v. Sublett*, 196 F.3d 1008, 1009-10 (C.A.9 1999) (collecting Arizona cases, statutes, and constitutional provisions showing that the Arizona Supreme Court has discretionary review in all but life-sentence or capital cases); *State v. Whipple*, 866 P.2d 1358, 1360 (Ariz. App. 1993) (acknowledging that the Arizona Supreme Court has discretionary-review powers in non-capital cases).

Furthermore, the Arizona Supreme Court denied this motion for reconsideration of its denial of review without comment. "The long-established general rule is that the attempt, to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." *Herndon v. State of Georgia*, 295 U.S. 441, 443 (1935) (collecting cases). *See also Adams*, 520 U.S. at 89 n.3 (collecting cases).[10] Indeed, in the analogous post-conviction review

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[9] Respondents shall demonstrate below that Petitioner did not challenge Arizona's molestation statutes in the lower courts.

[10] Besides suffering from the same infirmities as Petitioner's untimely motion for reconsideration, the AACJ's simultaneously-filed *amicus curiae* brief did not adequately present the Arizona Supreme Court with the pending Fourteenth Amendment challenge because:

context, this Court recently recognized, "Under Arizona law, a defendant cannot raise new claims in a motion for rehearing." *Landrigan v. Schriro*, 550 U.S. 465, 478 n.3 (2007) (concluding that state prisoner's motion for rehearing failed to present the new claim to Arizona's courts).

To avoid preclusion of any constitutional challenge to Arizona's molestation statutes, Arizona law required Petitioner to file a motion no later than 20 days before his trial. *See* Ariz. R. Crim. P. 16.1(b); *State v. Montano*, 65 P.3d 61, 67, ¶¶ 17-18 (Ariz. 2003) (rejecting an untimely motion to dismiss on Sixth Amendment pretrial delay grounds and approvingly citing *State v. Mercado-Torres*, 955 P.2d 35, 37 (App. Ariz. 1997), which upheld the trial court's denial of a defendant's untimely day-of-trial oral motion to dismiss a weapons charge on the basis that the underlying statute was unconstitutional). Instead, Petitioner's sole argument—both during and after trial—was that the court's child-molestation jury instructions misstated Arizona law because lack of sexual motivation was no longer an affirmative defense as a result of recent legislation, Senate Bill 1145. Pet. App. 38-39, 41-43; Resp. App. 2a-4a. Indeed, Petitioner's trial counsel *never* argued that the jury instructions to which he took objection violated the Fourteenth Amendment's Due Process Clause. Pet. App. 38-40, 42-43; Resp. App. 2a-4a.

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(1) Arizona courts do not address new issues raised by the *amicus curiae*, but not the parties, *see City of Tempe v. Prudential Ins. Co.*, 510 P.2d 745, 748 (Ariz. 1973); *Yollen v. City of Glendale*, 191 P.3d 1040, 1051, ¶ 39 n.39 (Ariz. App. 2008); (2) the Arizona Supreme Court denied AACJ's motion for leave to appear as *amicus curiae*, which was filed without the State's foreknowledge, *see* Ariz. R. Crim. P. 31.25(a) (requiring either consent of opposing party or leave of the court to appear as *amicus curiae* in a case); and (3) AACJ filed its motion after the Arizona Supreme Court *denied* review, while Rule 31.25(b) provides that *amicus* briefs are to be filed after the supreme court *grants* review. Resp. App. 36a-37a.

Because Petitioner failed to raise a federal due-process challenge to A.R.S. §§ 13–1410 (A) and –1407(E) before the trial court, he effectively waived on direct appeal the very constitutional claim he now presents to this Court. *See State v. Schwartz*, 935 P.2d 891, 898 (Ariz. App. 1996) (finding waived constitutional challenge to statute not raised below); *State v. Helffrich*, 846 P.2d 151, 153 n.3 (Ariz. App. 1992) (same); *State v. Takacs*, 819 P.2d 878, 985 (Ariz. App. 1991) (same).[11] Nor did Petitioner challenge Arizona's child-molestation statutes as unconstitutional on *any* basis in the opening and reply briefs that he filed with the Arizona Court of Appeals, and when he subsequently petitioned the Arizona Supreme Court to review the court of appeals' memorandum decision. Resp. App. 10a-16a, 19a-28a. Indeed, Petitioner's sole citation to federal constitutional law in state court—made in the seventy-ninth footnote of his opening brief without accompanying argument—gave the Arizona Court of Appeals no reason to construe Petitioner's argument as extending beyond whether the trial court's jury instructions correctly stated Arizona law. Resp. App. 15a, n.79 (citing *In re Winship*, 397 U.S. at 364; and U.S. Const. Amends. 5, 14.)

Besides the court of appeals' silence regarding the constitutionality of Arizona's child molestation laws, the following facts demonstrate that Petitioner's unexplicated citation to *Winship* did not squarely present the constitutional claim presented in his petition for a writ of certiorari.

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[11] *Cf. State v. Trostle*, 951 P.2d 869, 878 (Ariz. 1997) (pre-trial publicity not raised below was forfeited); *State v. Tison*, 633 P.2d 335, 344 (Ariz. 1981) ("The preclusion of issues applies to constitutional objections as well as statutory objections because an adherence to procedural rules serves a legitimate state interest in the timely and efficient presentation of issues."); *State v. Ramsey*, 124 P.3d 756, 766, ¶ 30 n.6 (Ariz. App. 2005) (defendant waived due-process claim not raised below); *State v. McKinley*, 755 P.2d 440, 443 (Ariz. App. 1988) (defendant waived Confrontation Clause claim not raised at trial).

First, *Winship* did not confront a claim that the state legislature had engaged in unconstitutional burden-shifting, but instead answered in the affirmative "the single, narrow question whether proof beyond a reasonable doubt is 'among the essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult." 397 U.S. at 360 (quoting *In re Gault*, 387 U.S. 1, 30 (1967)). If Petitioner had wished to argue that the 1993 amendments to A.R.S. § 13–1410 (A) unconstitutionally shifted to him the burden of proving the *mens rea* element of child-molestation, he should have made such intention clear to the Arizona Court of Appeal by citing post-*Winship* cases that directly raised that type of claim, such as *Patterson v. New York*, 432 U.S. 197 (1977), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Indeed, Petitioner's unexplicated citation to *Winship*, which predates the authorities he cites now before this Court, would not even satisfy the exhaustion requirement governing the closely analogous context of federal habeas review. *See McNair v. Campbell*, 416 F.3d 1291, 1303 (C.A.11 2005) ("The exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record."); *Mallory v. Smith*, 27 F.3d 991, 995 (C.A.4 1994) ("The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not turn the trick.") (quoting *Martens v. Shannon*, 836 F.2d 715, 717 (C.A.1 1988)). *Cf. United States v. Dunkel*, 927 F.2d 955, 956 (C.A.7 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

Furthermore, the context of Petitioner's citation to *Winship* in his opening brief likewise gave the Arizona Court of Appeals no reason to discern a federal constitutional

challenge to A.R.S. § 13–1410 (A).[12] At the outset, Petitioner framed the issue on appeal as whether he was "entitled to a new trial when *the trial judge* placed the burden on him to prove a lack of sexual motivation." Resp. App. 12a (emphasis added). Petitioner prefaced his "legal discussion" by forewarning the court of appeals, "The jury instructions in issue lead us to wade in the murky waters of the difference between an affirmative defense and a legal defense. The difference is critical as it defines who bears the burden of proof." *Id.* Petitioner thereafter relied upon three state-law sources that he claimed illuminated the Arizona Legislature's intent to make "lack of sexual motivation" a "legal defense" negating an element of child molestation, instead of an "affirmative defense" that A.R.S. § 13–205 (A) required him to prove by a preponderance of the evidence: (1) the statutory definition of "affirmative defense" set forth in A.R.S. § 13–103 (B); (2) Arizona precedent identifying motivation by sexual interest as an element of prior versions of Arizona's child-molestation statute; and (3) the nomenclature used in the title of A.R.S. § 13–1407. Resp. App. 12a-15a. Only after concluding that lack of sexual motivation was not an affirmative defense under Arizona law did Petitioner cite

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[12] Arizona courts have no duty to raise issues not raised by the defendant in criminal cases. *See, e.g., State v. Jones*, 4 P.3d 345, 357, ¶ 22 (2000) ("No court has held that the constitutional burden to meet the Sixth Amendment's Confrontation Clause shifts to the trial court in the absence of the defense counsel's motion or request to grant such immunity."); *State v. Johnson*, 570 P.2d 503, 505 (Ariz. App. 1977) (holding that the trial court "is not obligated . . . to raise and adjudicate *sua sponte* an insanity defense of a competent defendant based on the theory of the defendant's insanity at the time of the crime"); *State v. Lee*, 542 P.2d 413, 417 (Ariz. 1975) (holding that Arizona Rule of Criminal Procedure 8.6 does not require the trial court "to search out possible time violations on its own initiative" and reasoning that it is "unreasonable to require reversal when the trial court does not perform a function which properly belongs to defendant's counsel").

Winship for the unremarkable proposition that the State must prove all elements of child molestation beyond a reasonable doubt:

> This brings us to the key question: what difference does the distinction [between affirmative and legal defenses] make? A big one. A.R.S. § 13–205, applying as it does to only affirmative defenses, did not shift the burden of proof, by a preponderance or otherwise, to the defendant.
>
> This means that we are left with the cherished principle and constitutional due process right, imposing upon the state the burden to establish each element of the offense beyond a reasonable doubt. [FN 79: *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const. Amendments 5, 14; Ariz. Const. Art. 2, § 4.]
>
> This was not done in this case. Not only was the burden on the wrong party, it was the wrong standard.

Resp. App. 15a. Significantly, Petitioner's opening brief—like his subsequent reply brief and petition for review—did *not* alternatively contend that the Fourteenth Amendment's Due Process Clause would invalidate A.R.S. § 13–1410 (A) if the court of appeals reached the opposite conclusion that the Arizona Legislature had intended to establish "lack of sexual motivation" as an affirmative defense instead.

Given the fact that Petitioner's challenge to the jury instruction rested exclusively upon his claim that the trial court misconstrued the legislative intent underlying A.R.S. §§ 13–103(B), –1410(A), and –1407(E), the Arizona Court of Appeals had no reason to understand Petitioner's citation

to *Winship* as raising the unrelated and broader federal claim that these very statutes collectively violated due process. *See Adams*, 520 U.S. at 88-89 (holding that petitioners never properly presented the Alabama Supreme Court "the broader federal claim" that "minimum due process requires Class Members be given the right to opt out or exclude themselves from the class," where the petitioners cited *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), for an entirely different argument, and their ensuing discussion addressed only the narrower question of whether non-resident class members were afforded due process); *Jeter*, 486 U.S. at 459-60 (holding that petitioner's federal preemption challenge to Pennsylvania's former 6-year statute of limitations for paternity suits was neither pressed nor passed upon below, where the litigation in state court centered upon whether the Pennsylvania Legislature had intended to give retroactive effect to its new state statute complying with Congress' 18-year statute of limitations); *Alderson*, 324 U.S. at 186 (finding no jurisdiction to review constitutionality of statute where "it does not appear from the opinion of the state court of appeals that the federal question was presented to or considered by that court" [because] "[w]hile the opinion intimates that appellants' objection was made to the administration of the statute, it nowhere indicates that they contended that, as applied, the statute was invalid as repugnant to the federal Constitution").

Nor may Petitioner argue that his pending federal constitutional challenge to Arizona's child-molestation statutes was "pressed or passed upon" by the Arizona Court of Appeals because his opening brief cited *Winship* and the Fourteenth Amendment's Due Process Clause for the *different* proposition that the State must prove all elements of child molestation beyond a reasonable doubt. This Court's own precedent conclusively demonstrates that a party's presentation of one type of a federal-due process claim in

state court does *not* render every other conceivable due-process argument properly presented to the state judiciary. *See Clark v. Arizona*, 548 U.S. 735, 764-65 (2006) (declining to review a due-process challenge to trial court's possible restriction of observation evidence that "was neither pressed nor passed upon in the Arizona Court of Appeals," despite addressing the merits of other due-process arguments that petitioner properly presented to the state courts); *Gray v. Netherland*, 518 U.S. 152, 162-65 (1996) (recognizing that the habeas petitioner's brief had presented two "separate" due-process claims with "two particular analyses," one governing the petitioner's "notice of evidence" claim, and the other his "misrepresentation of evidence" claim); *Anderson v. Harless*, 459 U.S. 4, 7 (1982) (holding that habeas petitioner's citation to a Michigan case holding that the defendant had "a broad federal due process right to jury instructions that properly explain state law" in his appellate briefing before the Michigan Court of Appeals failed to exhaust the different due-process claim that the jury instruction relieved the prosecution of proving every element of the crime under "the more particular analysis developed in cases such as *Sandstrom* [*v. Montana*, 442 U.S. 510 (1979)]").

The foregoing conclusively demonstrates that Petitioner is seeking a writ of certiorari, based upon arguments that he never properly presented to the state courts. This Court, however, has repeatedly declined similar invitations to entertain "new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001) (citing *Lopez v. Davis*, 531 U.S. 230, 244, n.6 (2001)). *Accord Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999); *National Collegiate Athletic Ass'n v. Smith*,

525 U.S. 459, 469-70 (1999). Because the constitutional validity of Arizona's child-molestation statutes is a matter of great importance, this Court should honor the Arizona judiciary's place in our federal system by denying certiorari and granting Arizona courts the first opportunity to assess the constitutionality of its child-molestation statute in the first instance.[13] *See Bankers Life & Casualty Co.*, 486 U.S. at 79; *Gates*, 462 U.S. at 224.

II. THE CONFLICT THAT PETITIONER CLAIMS TO EXIST AMONG LOWER COURTS IS ILLUSORY AND INAPPOSITE TO A.R.S. § 13-1410(A).

Although Petitioner contends that the granting of certiorari in the instant case would resolve a conflict among several state courts regarding the ability of legislatures to "tamper with the prosecution's burden of proof in child molestation cases," this argument has two flaws: (1) the statutes at issue in the cases that Petitioner has cited contain language not found in Arizona's child-molestation laws; and (2) none of these cases address the question presented in this petition for writ of certiorari—whether the Arizona Legislature violated the Fourteenth Amendment's Due Process Clause by amending its child-molestation statutes to require the defendant to prove as an affirmative defense, "lack of sexual motivation," a fact the converse of which had formerly constituted an element of the crime, "motivation by sexual interest."

First, granting review in this case would not resolve any conflict among lower courts because the statutory definition of "sexual contact" in Arizona substantially differs from the

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[13] Indeed, as of the time of the filing of this brief in opposition, Arizona courts have *not* published any opinions addressing the constitutionality of A.R.S. § 13-1410.

definitions employed in the jurisdictions that generated the opinions cited by Petitioner. All of these cited cases present various legal questions stemming from variations of the phrase, "can [or could] be reasonably construed as being for the purpose of sexual arousal or gratification," included in the statutory definitions of "sexual contact" codified by the legislatures of Colorado, Michigan, Minnesota, Nebraska, Wisconsin, and Wyoming.[14] Arizona, however, defines "sexual contact" as "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact." A.R.S. § 13–1401.2.

Furthermore, none of Petitioner's cited cases involve a challenge to the constitutionality of a state child-molestation

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[14] *See People v. West*, 724 P.2d 623, 627 (Colo. 1986) (statutorily defining "sexual contact" as "intentional acts" that "can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse") (quoting Colo. Rev. Stat. § 18–3–401(3) (1978)); *People v. Piper*, 567 N.W.2d 483, 485 (Mich. App. 1997) (statutory definition of "sexual contact" requires proof of "intentional touching [that] can be reasonably construed for the purpose of sexual arousal or gratification") (quoting Mich. Comp. Laws. Ann. § 750.520c); *State v. Tibbetts*, 281 N.W.2d 499, 500-01 (Minn. 1979) (statutorily defining "sexual contact" as acts that "can reasonably be construed as being for the purpose of satisfying the actor's sexual or aggressive impulses") (quoting Minn. Stat. Ann § 609.341.11); *State v. Osborn*, 490 N.W.2d 160, 167 (Neb. 1992) (defining "sexual contact" as including "only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party") (quoting Neb. Rev. Stat. § 28–318(5)); *State v. Nye*, 302 N.W.2d 83, 84-85 (Wis. App. 1981) (statutory definition of "sexual contact" requires proof of "intentional touching [that] can be reasonably construed for the purpose of sexual arousal or gratification") (quoting Wis. Stat. Ann. § 940.20), *aff'd*, 312 N.W.2d 826 (Wis. 1981); *Bryan v. State*, 745 P.2d 905, 908 (Wyo. 1987) (defining "sexual intrusion" as requiring proof that the intrusion "can reasonably be construed as being for the purposes of sexual arousal, gratification or abuse") (quoting Wyo. Stat. Ann. § 6–2–301(a)(vii)(A)).

statute on the ground that legislative amendments shifted to the defendant the burden of disproving the existence of a fact that had originally been an element of that crime. Instead, Petitioner's cited cases resolved the following inapposite legal issues: (1) whether the state's statutory definition of "sexual contact" was void on vagueness grounds, *see West*, 724 P.2d at 624-27; *Piper*, 567 N.W.2d at 645-47; (2) whether the jury instructions on child-molestation "obscured and diluted" the reasonable-doubt standard by allowing convictions based upon a finding that the defendant's touching "could reasonably be construed as being for the purpose of" satisfying the defendant's sexual gratification, *see Tibbetts*, 281 N.W.2d at 500-01; *Nye*, 302 N.W.2d at 84-87; (3) whether the defendant gave an adequate factual basis to support his guilty pleas to sexual crimes *other than* child molestation, *see Osborn*, 490 N.W.2d at 166-68 (sexual assault); *Bryan*, 745 P.2d at 908-09 (first-degree sexual assault). Thus, these cases likewise fail to demonstrate the existence of a lower-court conflict that this Court could resolve by granting a writ for certiorari in this case.

III. PETITIONER'S RELIANCE ON *APPRENDI* AND ITS PROGENY IS MISPLACED.

Relying upon this Court's recent jurisprudence construing the Sixth Amendment's jury-trial guarantee, Petitioner analogizes the fact of "motivation by sexual interest" to a "functional equivalent of an element" of the crime of child molestation in Arizona. Building upon this analogy, Petitioner maintains that the Arizona Legislature's revisions to the statutory text of A.R.S. § 13–1410(A)—which effectively transformed the "lack of sexual motivation" defense in A.R.S. § 13–1407(E) into an "affirmative defense" that the defendant must prove by a preponderance of the evidence—impermissibly relabeled the "sexual motivation" element as an affirmative defense and

consequently violated his Sixth Amendment right to have a jury find this "functional equivalent of an element" of child molestation proven beyond a reasonable doubt. Petitioner's reliance on *Apprendi* and its progeny, however, is misplaced because he misconstrues the true definition of the term "functional equivalent of an element" and fails to recognize that this Court's recent Sixth-Amendment opinions focused upon vindicating constitutional guarantees not at issue here.

In *Apprendi*, this Court observed that during this Nation's founding years, "[t]he substantive criminal law tended to be sanction-specific," and thus both the indictment and the jury verdict necessarily reflected all of the facts necessary to impose the punishment prescribed for he charged offense. 530 U.S. at 478-81. "The mid-19th century produced a general shift in this country from criminal statutes 'providing fixed term sentences to those providing judges discretion within a permissible range.'" *Harris v. United States*, 536 U.S. 545, 558 (2002) (quoting *Apprendi*, 530 U.S. at 481). This new trend in American sentencing laws created a "distinction between an 'element' and a 'sentencing factor' [that] was unknown . . . during the years surrounding our Nation's founding," and ultimately led some legislatures to enact statutory schemes that effectively obliterated "the historical link between verdict and judgment and the constitutional limitation on judges' discretion to operate within the limits of the legal penalties provided" by "remov[ing] the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi*, 530 U.S. at 482-83 (emphasis in original). To invalidate sentencing statutes that sanctioned the imposition of sentences exceeding the maximum authorized by the jury's verdict, based upon judicially-found facts, this Court held that the Sixth Amendment's jury-trial guarantee requires that,

"[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt." *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (quoting *Apprendi*, 530 U.S. at 490). *Accord Cunningham v. California*, 549 U.S. 270, 282 (2007); *Harris*, 536 U.S. at 563.

The rationale underlying these cases is that any fact that increases the defendant's punishment above the maximum prescribed for his crime of conviction, regardless of their statutory label, constitutes the "functional equivalent of an element of *a greater offense*," *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (quoting *Apprendi*, 530 U.S. at 494 n.19) (emphasis added), which a jury must find beyond a reasonable doubt:

> Those facts, *Apprendi* held, were what the Framers had in mind when they spoke of "crimes" and "criminal prosecutions" in the Fifth and Sixth Amendments: A crime was not alleged, and a criminal prosecution not complete, unless the indictment and the jury verdict included all the facts to which the legislature had attached the maximum punishment. Any "fact that ... exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone," the Court concluded, *id.*, at 483, 120 S.Ct. 2348, would have been, under the prevailing historical practice, an element of *an aggravated offense*.

Harris, 536 U.S. at 563 (emphasis added). *See also Ring*, 536 U.S. at 605 ("When the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional quivalent of an element

of *a greater offense* than the one covered by the jury's guilty verdict.") (quoting *Apprendi*, 530 U.S. at 494 n.19) (emphasis added); *Harris*, 536 U.S. at 557 ("*Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of *an aggravated crime*—and thus the domain of the jury—by those who framed the bill of rights.") (emphasis added); *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring) ("[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] ... *the core crime and the aggravating fact together constitute an aggravated crime*, just as much as grand larceny is an aggravated form of petit larceny. *The aggravating fact is an element of the aggravated crime*.") (emphasis added).

Hence, Petitioner's argument that "sexual motivation" is the "functional equivalent of an element" of child molestation is incorrect because: (1) the Arizona Legislature did *not* authorize increasing Petitioner's sentence above the maximum penalty prescribed for violations of A.R.S. § 13–1410, based upon a *judicial* finding of his sexual motivation; and (2) this "functional equivalent of an element" term refers only to those facts that, if found, have the effect of exposing the defendant to a greater punishment than that authorized by the jury's guilty verdict and effectively serve as an element that distinguishes the crime of conviction from an aggravated offense. *See Ring*, 536 U.S. at 609 (finding that "Arizona's enumerated aggravating circumstances operate as 'the functional equivalent of a greater offense'") (quoting *Apprendi*, 530 U.S. at 494 n.19). Stated differently, *Apprendi* is inapplicable because Petitioner's sentences were based exclusively upon those facts that were alleged in the indictment and found by the jury beyond a reasonable doubt, and none that could be deemed "the functional equivalent of an element" of a *greater* offense.

"Thus, while we may label a fact as the 'functional equivalent of an element' for purposes of *Apprendi*, that does not transform the fact into an offense "element" for purposes of *Winship*." *United States v. Toliver*, 351 F.3d 423, 430 (C.A.9 2003). "It is clear, therefore, that *Apprendi's* prohibition on re-labeling facts that could be treated as elements as something else applies solely to sentence enhancement provisions that increase the range of punishment beyond that authorized by the jury's verdict, and did not overrule the conclusion in *Patterson* that the states constitutionally may 'reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes.'" *State v. Ray*, 966 A.2d 148, 161 n.15 (Conn. 2009) (quoting *Patterson*, 432 U.S. at 210).

CONCLUSION

For these reasons, the State respectfully requests that this Court deny Petitioner's petition for writ of certiorari.

Respectfully submitted

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

STATE OF ARIZONA,	) No. CR2006-030290-001SE
	)
Plaintiff,	)
	)
-vs-	) **MOTION FOR NEW TRIAL**
	)
STEPHEN MAY	) (The Hon. Sherry Stephens)
	)
Defendant.	)
	)

Defendant, Stephen May, by and through counsel undersigned, hereby moves this Court for an Order granting a new trial pursuant to ***Rule 24.1*** **of the Arizona Rules of Criminal Procedure.** The grounds supporting this motion are that the verdict is contrary to law or to the weight of the evidence; that the Court erred in the decision of a matter of law and in the instruction to the jury on a matter of law to the substantial prejudice of Defendant; and for reasons not due to the Defendant's own fault, he has not received a fair and impartial trial.

The verdict is contrary to law or the weight of the evidence:

Nothing in the evidence, either directly or inferentially, established that Stephen May was motivated by sexual interest in his dealings with these children. His testimony was specific and

uncontradicted that any "touching" that occurred was [2] unintended, accidental and devoid of sexual interest on his part. Further, no testimony or evidence established any peripheral conduct that would support a finding of such sexual interest. For example, no evidence of any conversation with the children at the time of the alleged touching or thereafter; no movement of his hand during the touching consistent with fondling or manipulating the children's genitals; all touching was described by the children as of short duration; no threats to the children not to tell anyone what occurred; in short, no indications of any sexual interest or intent was shown by Stephen was shown by any evidence. The weight of the evidence supports Stephen's testimony of innocent and incidental or accidental contact, and fails to support the jury's guilty verdicts.

Given the above, together with the jury's questions, the jury's verdict is not supported by the weight of evidence, but only by speculation of the jury.

The Court erred in a decision of a matter of law:

Following a hearing on Defendant's Motion to Sever, the Court declined to sever the unrelated allegation of Count 7 from the other counts of the indictment. As clearly shown by the jury's questions during its deliberations, it utilized evidence as to Count 7 to "corroborate" the allegations in the other counts, and utilized the allegations of the other counts to "corroborate" the allegation of Count 7. Because of the Court's error in failing to sever Count 7, evidence as to that count was misapplied to the finding of guilt. The Court also erred in failing to grant Defendant's motion for judgment of acquittal pursuant to Rule 20 at the end of the State's case.

The Court erred in the instruction of the jury on a matter of law to the substantial prejudice to Defendant.

Over objection, the Court gave erroneous instructions to the jury regarding [3] the burden of proof and the standard of proof required for their consideration regarding the defense of lack of sexual motivation or sexual interest. The defense is codified in *A.R.S. § 13-*

1407E and, pursuant to the most recent amendments to *A.R.S. § 13-103*, such a defense is not an "affirmative defense" requiring a defendant to prove the defense by "clear and convincing evidence."

Traditionally, affirmative defenses were always the defendant's burden of proof by a preponderance of the evidence. That situation changed substantially with the passage of Senate Bill 1145, an amendment to *A.R.S. § 13-103* and other Arizona statutes. The amendment above-referenced made a significant change in the definition of "affirmative defense." Previous to the amendment, "affirmative defense" was defined as "a defense that is offered and that attempts to ***justify*** the criminal actions of the accused." (Emphasis added). Following the amendment, that definition clearly was changed to mean a defense that attempts to **EXCUSE** the criminal actions of the accused. (Emphasis added). As a result of the amendment, an "affirmative defense" no longer includes a defense that "justifies" action otherwise criminal or "any defense that either denies an element of the offense charged or denies responsibility . . . or lack of intent."

Indirect touching of the genitals is justified during a playful interaction, such as in this case, if it is not motivated by sexual interest, even if undertaken intentionally. Here, Defendant acknowledged the possibility of unintended or accidental touching during play with the girls in the pool in Counts 1-4, and while assisting with computer skills in the classroom in Count 7. However, he was clear that not only was such contact unintended or accidental, it would have been without any motivation of sexual [4] interest. Because his conduct would have been justified under such circumstance, the amendment to *A.R.S. § 13-103* required that the State prove beyond a reasonable doubt that Defendant was motivated by sexual interest. The Court's instruction was in error, the jury was misled, and the Defendant was substantially prejudiced as a result.

The clearest indication of the level of prejudice to Defendant was the jury's chart on the wall of the deliberations room, which set forth the elements of the charged crimes as they understood the instructions to require. The last element they had written was "motivation of

sexual interest" following which they had written "Defendant must disprove" with the word "disprove" double underlined. The jury was mis-instructed to the point that they believed Defendant had the obligation to disprove that he was motivated by sexual interest.

Discussion:

For all of the reasons set forth in detail above, and for the reasons not due to his own fault, Stephen May did not receive a fair and impartial trial. This Court is urged to order a new trial so that he may receive that fair and impartial trial.

RESPECTFULLY SUBMITTED this 26th day of February, 2007.

PHILLIPS & ASSOCIATES

By /s Joel Erik Thompson
Chief Trial Attorney for the Firm
Certified Specialist in Criminal Law
By the Arizona Board of Legal Specialization

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	) COURT OF APPEALS
	) DIVISION ONE
Plaintiff,	) No. 1 CA-CR07-0144
	)
vs.	) Superior Court
	) No. CR2006-030290-001SE
STEPHEN EDWARD MAY,	)
	)
Defendant.	)

Mesa, Arizona
FEBRUARY 16, 2007

BEFORE: THE HONORABLE SHERRY K. STEPHENS
Judge of the Superior Court

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Sentencing)

REPORTED BY:

Dana D. Smith
Cert. No. 50566
Official Court Reporter

Prepared for Appeal

[2] APPEARANCES

For the State:

JOHN BEATTY
Deputy County Attorney

For the Defendant:

JOEL THOMPSON
Attorney at Law

. . .

[6] THE COURT: The Court has reviewed the letters submitted by Daniel Antkiwicz.

All right. Before we proceed to sentencing, the Court will hear arguments on the motion for new trial. Court has reviewed the written motion submitted by defense counsel and the State's response to that motion.

Mr. Thompson, is there anything that you want to [7] say in support of your motion?

MR. THOMPSON: Your Honor, our position is set forth in the motion. I didn't find anything in the State's response that really altered the issues that I presented or specifically addressed anything to respond to it. I will stand on the content of the motion.

THE COURT: All right. Mr. Beatty, anything to put on the record?

MR. BEATTY: The State stands by its response as well.

THE COURT: All right. The Court is going to deny the motion. Most of the issues were discussed and resolved at trial. The Court finds there was sufficient evidence to support the verdicts.

All right. Let's proceed with sentencing. . . .

. . .
. . .

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	) No. 1CA-CR07-0144
	) Superior Court No. CR2006-030290
Appellee,	) -001SE
	)
v.	)
	)
Stephen Edward May,	)
	)
Appellant.	)
	)

Appellant's Opening Brief

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[i] **Table of Authorities**

Blevins v. State, 591 N.E.2d 562 (Ind. App. 1992).....18
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[iii] **Other**

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[1] **Statement of the Case**

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[7] **B. Jury Instructions.**

The one debate over jury instructions centered on those regarding the defense to child molestation that the "defendant was not motivated by a sexual interest."[45] It was the position of the defense that the burden was on the state to [8] prove that the act was sexually motivated beyond a reasonable doubt.[46] The defense also argued[47] that the defense was not an affirmative defense, relying upon A.R.S. § 13-103.B, "'Affirmative defense' means a defense that is offered and that attempts to justify the criminal actions of the accused. . . . Affirmative defense does not include any defense that denies responsibility, including alibi, misidentification, or lack of intent."

The question of whether the defense was an affirmative one raised the issue of burden of proof: for an affirmative defense, the burden is placed on the defense, by a preponderance of the evidence. The rule is embodied in A.R.S. § 13-205.A, which the state cited,[48] "Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence...." The prosecutor added, "I just wasn't aware that . . . molestation had acquired a new element, Judge. . . . It certainly is not in my statute book (that) there is a new element in that statute."[49]

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[45] A.R.S. § 13-1407.E.
[46] T. Jan. 9, 2007, at 70-73, T. Jan. 10, 2007, at 100.
[47] T. Jan. 10, 2007, at 100.
[48] T. Jan. 10, 2007, at 100.
[49] T. Jan. 9, 2007, at 73.

The judge concurred with the state, so that the instructions given the jurors at the close of the case were:

> The crime of molestation of a child requires proof that the defendant [9] knowingly touched, directly or indirectly, the genitals of a child under the age of 15, It's a defense to child molestation that the defendant was not motivated by sexual interest.
>
> The defendant has raised the affirmative defense of lack of sexual motivation with respect to the charged offenses of molestation of a child. The burden of proving each element of the offense beyond a reasonable doubt always remains on the state. However, the burden of proving the affirmative defense of lack of sexual motivation is on the defendant. The defendant must prove the affirmative defense of lack of sexual motivation by a preponderance of the evidence. If you find that the defendant has proved the affirmative defense of lack of sexual motivation by a preponderance of the evidence, you must find the defendant not guilty of the offense of molestation of a child.[50]

The defense re-urged the issue in its motion for new trial.[51] The judge again ruled in favor of the State.[52]

. . .

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[50] T. Jan, 2007, at 107-108.

[51] IR 241.

[52] IR 250 at 2.

[12] **Statement of Issues**

1. The crime of child molestation has, as an essential element and as specific intent, a requirement that the touching was motivated by sexual interest. The lack of sexual motivation is a defense. The burden is on the prosecution to prove the existence of sexual motivation beyond a reasonable doubt. Isn't the defendant entitled to a new trial when the trial judge placed the burden on him to prove lack of sexual motivation?

. . .

[13] **Argument**

A. The jury instructions unconstitutionally placed the burden of proof on the defendant.

1. Standard of review. The appellate courts review *de novo* whether jury instructions adequately state the law.[71]

2. Legal discussion. The jury instructions in issue lead us to wade in the murky waters of the difference between an affirmative defense and a legal defense. A.R.S. § 13–1407.E, upon which the instruction was in part based, sets forth a legal, rather than affirmative defense. The difference is critical, as it defines who bears the burden of proof.

In a different context, the Eleventh Circuit, in *United States v. Cameron*,[72] discussed the difference in these two classes of defenses. The Court addressed the debate of using psychiatric

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[71] *State v. Johnson*, 212 Ariz. 425, 431, ¶ 15, 133 P.3d 735, 741, *cert. denied*, --- U.S. ---, 127 S.Ct. 559 (2006).

[72] *United States v. Cameron*, 907 F.2d 1051, 1063 (11th Cir. 1990).

testimony for the affirmative defense of insanity, versus its use as a legal defense to negate a specific intent crime via diminished [14] capacity. While the topic may be different, the analysis is on point:

> [B]oth Congress and the courts have recognized the crucial distinction between evidence of psychological impairment that supports an "affirmative defense," and psychological evidence that negates an element of the offense charged. "Affirmative defense" evidence of mental impairment, when specifically recognized and defined by the legislature, must be raised by the defendant and can "justify" or "excuse" conduct that is otherwise criminal.[73]

The *Cameron* court then contrasted this with the definition of legal defense:

> Psychological evidence that aids the trier in determining the defendant's specific state of mind with regard to the actions she took at the time the charged offense was committed, by contrast, is not an affirmative defense but is evidence that goes specifically to whether the prosecution has carried its burden of proving each essential element of the crime-at least when specific intent is at issue.[74]

The state law analysis begins with A.R.S. § 13–1407.E. It provides a defendant may raise the defense that any touching of a child under the age of 15 was not sexually motivated. Case

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[73] *Cameron*, 907 F.2d at 1063.

[74] *Cameron*, 907 F.2d at 1063.

law explains that sexual motivation constitutes a specific intent component of the crime,[75] and is an essential element of it.[76] This [15] means that the statute meets the *Cameron* definition of a legal defense, rather than an affirmative one.

A.R.S. § 13–1407.E's plain language is consistent with this. The statute says that it is a "defense" to molestation that there is a lack of sexual motivation. It does not say it is an "affirmative defense." The word choice illuminates the legislature's intent.[77]

A.R.S. § 13–103.B, in the version applicable to this case,[78] only bolsters the defense argument. Its last sentence reads, "Affirmative defense does not include any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification, or *lack of intent*." (Emphasis added.) The provision is, then, yet another illustration of the difference between a legal defense and an affirmative defense, and of the legislative intent. And, it demonstrates that once again, A.R.S. § 13-1407.E confers a legal defense. Its principle, if not its words, track the same distinction made by the *Cameron* court.

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[75] *State v. Turrentine*, 152 Ariz. 61, 67, 730 P.2d 238, 245 (App. 1986) ("evidence was sufficient for the jury to have found that appellant was motivated by an unnatural or abnormal sexual interest with respect to children and therefore is sufficient to support a finding of specific intent under A.R.S. § 13-1410").

[76] *State v. Brooks*, 120 Ariz. 458, 460, 586 P.2d 1270, 1272 (1978) ("An essential element of the offense of child molestation under § 13-653 is that the acts involved be motivated by an unnatural or abnormal sexual interest or intent with respect to children.")

[77] *State v. Dixon*, 216 Ariz. 18, 20, ¶ 7, 162 P.3d 657, 659, ¶ 7 (App. 2007).

[78] Amendments to A.R.S. § 13-103.B took effect April 24, 2006. *Garcia v. Browning*, 214 Ariz. 250, 254, ¶ 20, 151 P.3d 533, 537, ¶ 20 (2007)

This brings us to the key question: what difference does the distinction make? A big one. A.R.S. § 13–205, applying as it does to only affirmative defenses, did not shift the burden of proof, by a preponderance or otherwise, to the defendant.

[16] This means that we are left with the cherished principle and constitutional due process right, imposing upon the state the burden to establish each element of the offense beyond a reasonable doubt.[79]

This was not done in this case. Not only was the burden on the wrong party, it was the wrong standard.

The legal error is hardly harmless here. The allegations each concerned brief contact—which could have been accidental, particularly in light of Mr. May's neurological problems. The events occurred in settings where it was natural for Mr. May and the children to come into contact with each other. Mr. May never threatened the children or made sexual remarks to them. The state would have been hard pressed to meet its burden.

This most serious of legal errors entitles Mr. May to a new trial, with instruction to the jury that the state must prove sexual motivation beyond a reasonable doubt.

. . .

[32] **Conclusion**

The errors in this case entitle Mr. May to the following relief:

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[79] *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const. Amendments 5 and 14; Ariz. Const. Art. 2, § 4.

1. A new trial with instruction that the state must prove the presence of sexual motivation beyond a reasonable doubt.

[33]

RESPECTFULLY SUBMITTED this 11th day of October 2007.

DEBUS, KAZAN, & WESTERHAUSEN, LTD.

By /s/ Tracey Westerhausen
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2008 WL 933139

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	) No. 1CA-CR07-0144
	) Superior Court No. CR2006-030290
Appellee,	) -001SE
	)
v.	)
	)
Stephen Edward May,	)
	)
Appellant.	)
	)

Appellant's Reply Brief

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[2] **II. The Legal versus Affirmative Defense of Lack of Sexual Motivation.**

In the instant case, the defense raised the issue of burden of proof regarding sexual motivation before the trial court. It urged that the burden was on the state to prove, beyond a reasonable doubt, the presence of sexual motivation.

[3] In response, the state relies heavily on this Court's recent opinion, *State v. Simpson.*[11] In that case, the defendant argued on appeal that the trial court should have instructed the jury that his actions were motivated by sexual interest, pursuant to A.R.S. § 13–1407.E.[12] But at the time of trial, the defendant didn't raise the defense, either legally or affirmatively.[13] Because of this, the appellate court concluded that there was no error, fundamental or otherwise.[14] The consequence of the procedural posture of *Simpson* renders the entire analysis of motive versus intent as *obiter dictum.*[15]

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[11] *State v. Simpson*, 217 Ariz. 326, 173 P.3d 1027 (App. 2007).

[12] *Simpson*, 217 Ariz. at 328 ¶ 11, 173 P.3d at 1029 ¶ 11.

[13] *Simpson*, 217 Ariz. at 330 ¶ 23, 173 P.3d at 1031 ¶ 23.

[14] *Simpson*, 217 Ariz. at 330 ¶ 23, 173 P.3d at 1032 ¶ 23.

[15] *Black's Law Dictionary, obiter dictum*: "A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be (Continued)

The state does raise an interesting point, not one addressed by Arizona appellate courts: the distinction, if any, between motive and intent.[16] Others states, [4] as cited in the answering brief, provide judicial definitions for the terms.[17] But there is no need to create a judicial definition for "motive," as, "Words and phrases shall be construed according to the common and approved use of the language."[18]

Applying this rule to the word "motive," the dictionary defines it as, "some inner drive, impulse, *intention*, etc., that causes a person to do something or act in a certain way; incentive; goal."[19] Thus, for our purposes, the difference between motive and intent is too close to be the basis to reject A.R.S. § 13–1407.E as a legal defense.

A key point that the State fails to address is that both the title of A.R.S. §13-1410.A and its contents refer to "molestation." The word choice formed the keystone of *State v. Brooks*[20] and *State v. Turrentine*,[21] where the statute in question

(Continued).

considered persuasive.), 8th Ed. 2004.

[16] *State vs. Sanderson*, 182 Ariz. 531, 542, 548, 898 P.2d 483, 491, refers in passing to A.R.S. § 13-1407.E as an affirmative defense regarding motive.

[17] *E.g., State v. Hughes*, 125 S.W.2d 66, 70 (Mo. 1939) ("Motive is the moving cause which induces action... Intent is the purpose or design with which an act is done....").

[18] A.R.S. § 1-213.

[19] WEBSTER'S NEW WORLD COLLEGE DICTIONARY, 2000, at 940 (emphasis added).

[20] *State v. Brooks*, 120Ariz. 458, 586 P.2d 1270 (1978).

used the word "molests." Oddly, the cases upon which the State relies fail to mention this fact. It is important to remember that the legislature is presumed to [5] know of the judicial interpretation of a statute and to approve it when it retains the same language in the statute after amendment.[22] That principle applies here, so that the term "molestation" retains an element of sexual motivation.

Contrary to the state's assertion, Mr. May was indeed entitled to the instruction that he was not motivated by a sexual interest, as the trial court correctly concluded. He admitted at trial that he might have touched the genital areas of the two girls, but accidentally and not sexually motivated.[23] He was entitled to the lack of motivation instruction because it was a theory of defense reasonably supported by the evidence.[24]

In *State v. McPhaul*, for example, the trial court refused to give a lesser-included robbery instruction in an armed robbery case, because the defendant said he wasn't there. This Court reversed, holding, "We see nothing inconsistent, illogical or improper about a defendant saying, 'I was not the person who committed the robbery, but even if you do not believe me, the evidence shows that whoever did commit it was not armed.'"[25]

(Continued).

[21] *State v. Turrentine*, 152 Ariz. 61, 730 P.2d 238 (App. 1986).

[22] *Jeter v. Mayo Clinic Arizona*, 211 Ariz. 386, 393 ¶ 31, 121 P.3d 1256, 1253 ¶31 (App. 2005).

[23] T. January 10, 2007 at 39-41, 56.

[24] *State v. McPhaul*, 174 Ariz. 561, 562, 851 P.2d 860, 861 (App. 1992).

[25] *McPhaul*, 174 Ariz. at 562, 851 P.2d at 861.

Here, Mr. May admitted that the touching might have occurred. If so, it was [6] without sexual intent. He clearly falls under the reasoning of *McPhaul*, and was entitled to the instruction.

III. The Discharged Jury Issue is One of Fundamental Error.

. . .

Conclusion. For the error in the jury instruction and in the jury discharge matter, Mr. May is entitled to a new trial. In the alternative, he is entitled to a new sentencing.

RESPECTFULLY SUBMITTED this 5th day of March 2008.

DEBUS, KAZAN, & WESTERHAUSEN, LTD.

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2008 WL 5585284

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	) No. 1CA-CR07-0144
	) Superior Court No. CR2006-030290
Plaintiff,	) -001SE
	)
v.	) **Petition for Review to the Arizona**
	) **Supreme Court**
Stephen Edward May,	)
	)
Defendant.	)
	)

Reasons why the petition should be granted (a preview). Mr. May's petition presents two issues to this Court. The first is an opportunity to address the operation of the defenses that appear in A.R.S. § 13-1407 to child molestation (and other sex offenses). On its face, the child molestation

statute has few defenses.[1] For example, a person engaged in lawful medical examinations or emergency help, who contacts a child's genitals, is subject to prosecution, as their acts fall within the literal confines of the statute. For example, a person engaged in lawful medical examinations or emergency help, who contacts a child's genitals, is subject to prosecution, as their acts fall within the literal confines of the statute.

[2] One might think, well, that is silly. The state would never file such a charge; it would have to prove that the person acted with a sexual motivation. That assumption is wrong. Not because of a statute, however, but because of case law. Under A.R.S. § 13-1407, there are defenses to sex offenses such as child molestation, for medical and emergency personnel, and for a person, as in the instant matter, who lacks a sexual motivation.[2] But case law in the instant matter and in *State v. Simpson*[3] says that the defenses in A.R.S. § 13-1407 are instead affirmative defenses that the defendant, not the state, must prove. The statute is entitled "Defenses," and the paragraphs of the statute use the word "defense," but the appellate courts have held that A.R.S. § 13-1407 really establishes affirmative defenses. This result was imposed by the appellate courts, not by the legislature.

The second situation concerns dismissed jurors who are allowed to re-deliberate and reach a verdict, without any inquiry into possible taint between dismissal and re-deliberation. This case presents an opportunity to provide further assistance to

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[1] A.R.S. § 13-1410.A. "Molestation of child... E. A person commits molestation of a child by intentionally or knowingly engaging in . . . sexual contact ... with a child under fifteen years of age."

[2] A.R.S. § 13-1407. Defenses. "... It is a defense to a prosecution (for child molestation) that the defendant was not motivated by a sexual interest."

[3] *State v. Simpson*, 217 Ariz. 326, 173 P.3d 1027 (App. Dec. 18, 2007).

judges and lawyers faced with a request by a discharged hung-jury, asking the trial court if it may "deliberate" again after all.

2. Issues presented to and decided by the Court of Appeals.

A. A.R.S. § 13-1407, entitled "Defenses," enumerates defenses to child molestation. Subpart E provides that, "it is a defense" to child molestation "that [3] the defendant was not motivated by a sexual interest." The Court of Appeals held that A.R.S. § 13-1407.E created an *affirmative defense*, thus shifting the burden of proof to the defendant. Did the Court of Appeals erroneously shift the burden of proof to the defendant, to prove that he was not sexually motivated?

B. Under the state and federal constitutions, a defendant is guaranteed a trial by a fair and impartial jury, including a jury free from taint by outside sources. The jurors here were discharged, minutes passed, and the dismissed jurors were allowed to re-deliberate. Is Mr. May entitled to a new trial because the trial court failed to explore jury taint that may have deprived Mr. May of a fair trial?

3. Facts.

Mr. May was charged with seven counts of child molestation, and went to trial. During jury instructions, the defense argued that the jurors must be instructed that the state bore the burden of proving beyond a reasonable doubt that Mr. May was motivated by sexual interest during the incidents. This was in accordance with A.R.S. § 13-1407.E. The trial judge rejected the argument, finding that lack of sexual motivation was an affirmative defense that must be established by the defense, and by a preponderance of evidence.

. . .

The Court of Appeals affirmed the convictions. For the sexual motivation issue, the decision relied on a recent opinion, *State v. Simpson*.[4] For the second issue, the Court rejected a large body of case law cautioning against re-deliberation by a discharged jury without inquiry of taint, including *State v. Crumley*.[5]

4. Reasons why the Court should grant review.

A. Defenses v. affirmative defenses. The defenses statute, A.R.S. § 13- 1407, operates in tandem with predicate offense statutes, such as sexual abuse[6], sexual conduct with a minor[7], and child molestation.[8] Previously, in *State v. Getz*[9], [5] this Court accepted a petition addressing the interaction between a § 13-1407 defense and a charge of sexual abuse. "We did so," the Court said, "in the hope of providing some guidance concerning the proper interpretation of these confusing statues and the equally confusing case law they have produced."[10]

With Mr. May's case, the Court can correct an important issue of law that was wrongly decided. The lack of sexual motive defense under A.R.S. § 13-1407.E is just that, a defense, and not an affirmative defense, to the predicate offense.

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[4] *State v. Simpson*, 217 Ariz. 326, 173 P.3d 1027 (App. Dec. 18, 2007).

[5] *State v. Crumley*, 128 Ariz. 302, 305-06, 625 P.2d 819, 894-95 (1981).

[6] A.R.S. § 13-1404.

[7] A.R.S. § 13-1405.

[8] A.R.S. § 13-1410.

[9] *State v. Getz*, 189 Ariz. 561, 562, 944 P.2d 501, 504 (1997) (holding that judgment of acquittal should have been granted where undisputed evidence showed that 16 year old victim consented to conduct).

[10] *Getz*, 189 Ariz. at 562, 944 P.2d at 504.

What reasons support this argument? There are at least four.

First, in looking at the language of the statute, it is labeled as defense, and the word "affirmative" nowhere appears in the text. If statutory language is clear, the courts need not resort to other methods of statutory construction.[11] The legislature has said that A.R.S. § 13-1407 is comprised of defenses.

Second, the courts "discern and give effect to the legislature's intent."[12] Unless the language of a statute is unclear, there is no need to look beyond its plain meaning.[13] As was argued above, A.R.S. § [13-1407] nowhere uses the word "affirmative" in listing defenses.

[6] Third, the statutory definitions of a legal defense and affirmative defense are consistent with the defense position. The legislature defined a legal defense as one that "either denies an element of the offense charged or denies responsibility, including alibi, misidentification or *lack of intent*."[14] (Emphasis added.) In contrast, the legislature delineated an "affirmative defense" as one that "attempts to justify the criminal action of the accused."[15]

Fourth, statutes on the same subject matter are read together and harmonized to avoid an absurd result.[16] Interpreting A.R.S. §13-1407 as a list of "affirmative defenses" leads to the absurd result that every person who touches a child's genitals whether

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[11] *State v. Riggs*, 189 Ariz. 327, 333, 942 P.2d 1159, 1165 (1997)
[12] *State vs. Dixon*, 216 Ariz. 18, 20, ¶ 7, 162 P.3d 657, 659, ¶ 7 (App. 2007).
[13] *Dixon*, 217 Ariz. at 18, ¶ 7, 162 P.3d at 659,¶ 7.
[14] A.R.S. § 13-103.B.
[15] A.R.S. § 13-103.B.
[16] *State v. Johnson*, 171 Ariz. 39, 42, 827 P.2d 1134, 1137 (App. 1992).

at a doctor's office or rescue scene may be charged with child molestation and then must prove the defense. That incongruous result falls away if the statute provides, as it says it does, a list of defenses which the state much [sic] prove, and prove beyond a reasonable doubt.

Mr. May is entitled to a new trial, with the burden of proof properly allocated to the state, beyond a reasonable doubt.

[7] **B. Discharged jury.** From the record, it is true that it appears only a few minutes passes between the jurors announcing their deadlock and their request to return to deliberations. On this basis, the Court of Appeals rejected Mr. May's argument.

. . .

RESPECTFULLY SUBMITTED this 29th day of September, 2008.

DEBUS, KAZAN, & WESTERHAUSEN, LTD.

By /s/ Tracey Westerhausen
Tracey Westerhausen
Attorneys for Defendant

Supreme Court
State of Arizona
402 Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3231

February 10, 2009

RE: **STATE OF ARIZONA v STEPHEN EDWARD MAY**
Arizona Supreme Court No. CR-08-0281-PR
Court of Appeals Division One No. 1 CA-CR 07-0144
Maricopa County Superior Court No. CR2006-030290-001 SE

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 10, 2009, in regard to the above-referenced cause:

ORDERED: Petition for Review to the Arizona Supreme Court = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 10th day of February 2009.

Rachelle M. Resnick, Clerk
TO:
Robert A. Walsh, Assistant Attorney General, Arizona Attorney General's Office
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IN THE SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA,	) No. CR-02811CA-CR07-0144
	)
Plaintiff,	) Court of Appeals No. 1 CA-CR
	). 2006-0144
v.	)
	) Superior Court No. CR2006-030290
Stephen Edward May,	) -001SE
	)
Defendant.	) **Motion for Reconsideration of**
	) **Denial of Review**

Defendant Stephen May asks this Court to revisit its decision to decline review. Mr. May's situation presents significant, recurring legal issues regarding two of the most important constitutional protections that our system of justice guarantees to criminal defendants: the right to convicted only upon proof beyond a reasonable doubt and the tried to be tried before an impartial jury. Underscoring the significance of the statewide constitutional issues presented on this case, the Arizona Attorneys for Criminal Justice, simultaneously with the filing of [2] the motion, have asked leave to file an *amicus*

curiae brief to assist in bringing to the attention the important questions presented by Mr. May's case.

Current Procedural Posture

This Court denied review of Mr. May's petition on February 10, 2009. He asked the Court of Appeals to stay the issuance of the mandate. The Court granted the motion on February 27, 2009, providing a 90-day window for further action. That same date, the state filed an opposition to the defense stay request. It then followed with a motion to reconsider the grant of the stay of mandate. The defense advised that it would file nothing further regarding the stay unless requested by the Court. The Court of Appeals has not ruled on the state's motion to reconsider the stay issue.

A. Summary of the Facts.

To refresh the Court's recollection, here's a synopsis of the facts.

Mr. May was charged with seven counts of child molestation,[1] and went to trial. During jury instructions, the defense argued that the jurors must be instructed that the state bore the burden of proving beyond a reasonable doubt that Mr. May was motivated by sexual interest during the incidents. This was in accordance with [3] A.R.S. § 13-1407.E.[2] The trial judge rejected the argument, finding that lack of sexual motivation

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[1] A.R.S. § 13-1410.A. "Molestation of child. "A person commits molestation of a child by intentionally or knowingly engaging in . . . sexual contact . . . with a child under fifteen years of age."

[2] A.R.S. § 13-1407. Defenses. "... It is a defense to a prosecution (for child molestation) that the defendant was not motivated by a sexual interest."

was an affirmative defense that must be established by the defense, and by a preponderance of the evidence.

. . .

The Court of Appeals affirmed the convictions. For the sexual motivation issue, the decision relied on a recent opinion, *State v. Simspon*.[3] . . .

[4] The Issues Presented

1. The child molestation statute violates due process because it relieves the state from proving every element of the charged crime beyond a reasonable doubt. First, the statute does this by making too many everyday and innocent acts fall within its definition of child molestation. Second, although the legislature has broad authority to define the elements of a crime, it may not lower the state's burden of proof by calling an "element" something else.[4]

. . .

Conclusion

The facts and the law join here to give this Court the opportunity to scrutinize and clarify re-appearing constitutional issues of statewide importance. AACJ has [5] offered its aid in doing so. Certainly, the issues and AACJ's interest in them are reasons justifying a reconsideration of the denial of review. If

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[3] *State v. Simpson*, 217 Ariz. 326, 173 P.3d 1027 (App. Dec. 18, 2007).
[4] *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

there were ever a case about which the denial of review should be reconsidered, it is this one.

RESPECTFULLY SUBMITTED this 24th day of March, 2009.

DEBUS, KAZAN, & WESTERHAUSEN, LTD.

By /s/ Tracey Westerhausen
Tracey Westerhausen
Attorneys for Defendant

2006 Ariz. Legis. Serv. Ch. 199 (S.B. 1145)

CHAPTER 199
S.B. 1145
DEFENSES OF CRIMINAL CONDUCT

AN ACT AMENDING SECTIONS 13-103, 13-205 AND 13-411, ARIZONA REVISED STATUTES; AMENDING TITLE 13, CHAPTER 4, ARIZONA REVISED STATUTES, BY ADDING SECTIONS 13-418, 13-419 AND 13-420; AMENDING LAWS 1983, CHAPTER 255, SECTION 1, AS AMENDED BY LAWS 1990, CHAPTER 410, SECTION 3; RELATING TO DEFENSES OF CRIMINAL CONDUCT.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 13-103, Arizona Revised Statutes, is amended to read:

§ 13-103. Abolition of common law offenses and affirmative defenses; definition

A. All common law offenses and affirmative defenses are abolished. No conduct or omission constitutes an offense or an affirmative defense unless it is an offense or an affirmative defense under this title or under another statute or ordinance.

B. For the purposes of this section, "affirmative defense" means a defense that is offered and that attempts to ~~justify~~ excuse the criminal actions of the accused or another person for whose actions the accused may be deemed to be accountable. Affirmative defense does not include any justification defense pursuant to chapter 4 of this title or any defense that either denies an element of the offense charged or denies

responsibility, including alibi, misidentification or lack of intent.

Sec. 2. Section 13-205, Arizona Revised Statutes, is amended to read:

§ 13-205. Affirmative defenses; burden of proof

A. Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence, ~~including any justification defense under chapter 4 of this title~~. Justification defenses under chapter 4 of this title are not affirmative defenses. Justification defenses describe conduct that, if not justified, would constitute an offense but, if justified, does not constitute criminal or wrongful conduct. If evidence of justification pursuant to chapter 4 of this title is presented by the defendant, the state must prove beyond a reasonable doubt that the defendant did not act with justification.

B. This section does not affect the presumption contained in section 13-411, subsection C and section 13-503.

Arizona Rule of Criminal Procedure 31.25:

a. Filing and Form of Brief; Participation in Oral Argument. A brief of an *amicus curiae* may be filed only if accompanied by written consent of all parties or by leave of court granted upon motion. The brief shall be lodged with the motion, if any. The motion for leave shall identify the interest of the applicant, state that the applicant has read the relevant brief, petition or motion and shall state the reasons accepting applicant's *amicus curiae* brief would be desirable. A party desiring to respond to the amicus brief shall file the response within 20 days of service of a brief filed with consent, or within 20 days of the Court's order granting a motion for leave to file an *amicus* brief. Rules 31.13, Arizona Rules of Criminal Procedure shall govern the form of an *amicus* brief, except that it shall not exceed 12,000 words in length if done in proportionately spaced typeface, or 35 pages if done in monospaced typeface, unless otherwise permitted by the court. An *amicus curiae* may participate in the oral argument only by leave of the appellate court.

b. Time and Length Limits Applicable to *Amicus* Briefs in the Supreme Court. Parties desiring to file an *amicus curiae* brief shall file such briefs as provided by this rule, except that an *amicus curiae* brief relating to a special action petition shall be filed as expeditiously as possible after the special action petition is filed, as provided for in Rule 7(g), Rules of Procedure for Special Actions.

(1) Briefs filed prior to a decision by the Court to grant review. Unless otherwise ordered by the Court, an *amicus* brief in support of a petition for review or a response to a petition for review accompanied by written consent of all parties, or a motion for leave to file the brief shall be filed no later than 21

days after the filing of the response to the petition for review. Such briefs shall comply with the form and length requirements of Rule 31.19(c) exclusive of any appendix.

(2) Briefs filed after the Court has granted review. After the Court has granted review, and unless otherwise ordered, an *amicus* brief accompanied by written consent of all parties, or a motion for leave to file an *amicus* brief, shall be filed no later than 10 days after the date ordered by the Court at the time review was granted for filing supplemental briefing by the parties in the particular case. Such briefs shall comply with rule 31.13 and shall not exceed the page limitation imposed for the parties' supplemental briefs.

(3) Responses to *amicus curiae* briefs. A party wishing to respond to an *amicus* brief shall file the response within 20 days of service of a brief filed with consent or within 20 days of the court's order granting a motion for leave to file an *amicus* brief. The response shall comply with the page and formatting requirements imposed on the particular *amicus* brief to which it relates.

(4) Late-filed briefs and responses. Leave for filing a late *amicus* or response brief shall be granted only for good cause shown.

(3)

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In The

Supreme Court of the United States

STEPHEN EDWARD MAY,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition For Writ Of Certiorari To Division One Of The Court Of Appeals Of The State Of Arizona

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In the absence of guidance from this Court, Arizona and its sister states have fallen into conflict regarding whether and to what extent they may "manipulate the prosecutor's burden of proof by . . . placing the affirmative defense label on 'at least some elements' of traditional crimes." *Apprendi v. New Jersey*, 530 U.S. 466, 475 (2000) (quoting *Patterson v. New York*, 432 U.S. 197, 210 (1977)). Conceding that "the constitutional validity of Arizona's child-molestation statutes is a matter of great importance" (Br. in Opp'n 30), the State nevertheless resorts to misdirection in its attempt to divert the Court from the narrow, properly presented question raised by this case. *Apprendi* is not, as the State contends, limited to "construing the Sixth Amendment's jury-trial guarantee." (Br. in Opp'n 32.) And, contrary to the State's arguments, May did raise to the Arizona state courts the constitutional challenge presented in his Petition. Finally, published decisions in several states demonstrate that there is real conflict regarding whether a legislature may constitutionally reduce the government's burden to prove the sexual part of a sex crime.

1. The State Misapprehends This Court's Holding in *Apprendi v. New Jersey*, Which Rests Directly on the Due Process Requirement That the Government Prove Every Element of a Crime Beyond a Reasonable Doubt.

The *only* constitutional principle at issue in the Petition is the one enunciated in *Winship* and confirmed in *Apprendi*: "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Apprendi*, 530 U.S. at 477 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)) (alteration in *Apprendi*). The State ignores this critical component of *Apprendi*'s rationale when it insists that May's "reliance on *Apprendi* and its progeny . . . is misplaced." (Br. in Opp'n 33.)[1]

The State is similarly wrong when it argues that *Apprendi*'s holding "refers only to those facts that, if found, have the effect of exposing the defendant to a greater punishment than that authorized by the jury's guilty verdict." (Br. in Opp'n 35.) On the contrary, the holding of *Apprendi* is so inextricably linked with the core due process principles enunciated in *Winship* and expounded in *Mullaney v.*

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[1] The State's claim that "Petitioner maintains that the Arizona Legislature[ ] . . . violated his Sixth Amendment right" is bizarre. (*See* Br. in Opp'n 32-33.) No such claim is present in the Petition, nor is the Sixth Amendment ever cited in the Petition.

Wilbur, 421 U.S. 684 (1975), and *Patterson* that the principal dissent suggested that *Apprendi* "would require the Court to overrule . . . *Patterson*." *Apprendi*, 530 U.S. at 544 (O'Connor, J., dissenting). Thus, the State's argument that *Apprendi* "applies solely to sentence enhancement provisions" (Br. in Opp'n 36 (citation omitted)) mistakenly presumes the answer to the question presented in the Petition and so far left unanswered by this Court: Does *Apprendi*'s functional approach apply not only to facts necessary to increase the degree of punishment, but also "to facts that authorize criminal punishment in the first place?" (Pet. 16-17.)

2. May Timely and Fairly Presented His Constitutional Claim to Arizona's Courts.

Without question, May's claim was "properly presented to[ ] the state court that rendered the decision [this Court has] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). In his Opening Brief before the Arizona Court of Appeals, whose decision this Court has been asked to review, May's challenge to the jury instructions given in accordance with Arizona Revised Statutes sections 13-1407(E) and 13-1410 literally begins and ends with the Constitution. The first argument in May's Opening Brief is titled, "**The jury instructions unconstitutionally placed the burden of proof on the defendant**." (Br. in Opp'n 12a.) After raising a statutory argument, May returned to press the basic constitutional guarantee at issue: "This means that

we are left with the cherished principle and constitutional due process right, imposing upon the state the burden to establish each element of the offense beyond a reasonable doubt. This was not done in this case." (*Id.* at 15a.) As authority for this proposition, May cited *Winship* and the Fifth and Fourteenth Amendments. (*Id.*)[2] These statements plainly brought May's constitutional claim "to the attention of the state court with fair precision and in due time" and therefore place the question presented in the Petition within the Court's jurisdiction. *Street v. New York*, 394 U.S. 576, 584 (1969) (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)).

The State's claim that the Court of Appeals "had no reason to understand" that May had raised a federal due process claim (Br. in Opp'n 27-28) is particularly vexing because, in response to May's having raised the issue in his Opening Brief, the State itself pitched the issue to the forefront in its Answering Brief in that court. At the beginning of its "Argument" section in that brief, the State urged that "[a]lthough the Fourteenth Amendment's Due Process Clause obligates the prosecution to prove every *element* of a criminal offense beyond a reasonable doubt, legislatures may constitutionally require the defendant to

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[2] The State's attempt to devalue the citations to *Winship* and the Constitution as occurring "in the seventy-ninth footnote of his opening brief without accompanying argument" is misleading. (*See* Br. in Opp'n 24.) Every citation in that brief appears in a footnote rather than in the text.

bear the burden of proving affirmative defenses." (Reply Br. App. 5 (citing *Winship* and *Martin v. Ohio*, 480 U.S. 228, 231-34 (1987)).)

The State's related argument that May's reliance on *Winship* in his Opening Brief in the Arizona Court of Appeals "did not squarely present the constitutional claim presented in his petition" (Br. in Opp'n 24) is premised on the mistaken belief that *Winship* does not address precisely the due process principle implicated in this case. (*See* Br. in Opp'n 24-25, 28-29.) Both *Winship* and this case hinge on the constitutional requirement that, before criminally punishing one of its citizens, the state must "show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." *In re Winship*, 397 U.S. at 363 (quoting *Davis v. United States*, 160 U.S. 469, 493 (1895)). Contrary to the State's suggestion (Br. in Opp'n 25), May did not need to cite the later cases of *Mullaney* and *Patterson* to preserve his *Winship*-based due process claim. *See Zimmerman*, 278 U.S. at 67 ("No particular form of words or phrases is essential . . . ."); *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982) (The Supreme Court's "jurisdiction does not depend on citation to book and verse.").

Furthermore, the question presented in the Petition was first raised in the trial court. May requested a jury instruction requiring the State to prove sexual motivation beyond a reasonable doubt (Pet. 4; Pet. App. 35) and argued that "the State is obliged to prove a motivation of sexual interest as an element of

the offense" (Pet. App. 38). In response, the State relied on *State v. Sanderson*, 898 P.2d 483 (Ariz. Ct. App. 1995), *review denied* (Ariz. July 11, 1995), to argue that "[t]he defendant constitutionally carries the burden of proving lack of sexual motivation by a preponderance of the evidence." (Pet. App. 50-51.) "This should have sufficed to alert the trial judge to petitioner's reliance on due process principles." *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978) (holding as sufficient to raise federal due process claims petitioner's objection regarding "an instruction on the presumption of innocence" that "invoked fundamental principles of judicial fair play" (internal alteration and quotation marks omitted)).[3]

Moreover, the State is mistaken to suggest that a challenge to the jury instructions did not preserve a challenge to the statutes on which the jury instructions were premised. (*See* Br. in Opp'n 10, 26.) "[T]he jury instruction[s'] construction of [Arizona's statutes] 'is a ruling on a question of state law that is as

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[3] The State contends that if a defendant does not squarely raise a constitutional objection at trial, Arizona law deems the argument waived or precluded on appeal. (Br. in Opp'n 24.) This is false. *See State v. Henderson*, 115 P.3d 601, 607 (Ariz. 2005) ("Fundamental error review . . . applies when a defendant fails to object to alleged trial error."). Even if May had said nothing about the jury instructions applying Arizona Revised Statutes sections 13-1407(E) and 13-1410, his claim of error to the Arizona Court of Appeals would have remained viable. *Cf. id.* at 608, 610 (holding that non-objected-to *Apprendi/Blakely* error was fundamental and would have required new sentencing proceedings).

binding on [the Supreme Court] as though the precise words had been written into' the statute[s]." *Virginia v. Black*, 538 U.S. 343, 364 (2003) (plurality opinion) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)) (holding unconstitutional provision of statute "as interpreted by the jury instruction"). And Arizona appellate courts have at least twice construed Arizona Revised Statutes sections 13-1407(E) and 13-1410 to be consistent with the jury instructions May challenges here. *See State v. May*, No. 1 CA-CR 07-0144, 2008 WL 2917111, at **1-2 (Ariz. Ct. App. July 24, 2008) (Pet. App. 3-5); *State v. Simpson*, 173 P.3d 1027, 1030 (Ariz. Ct. App. 2007) (Pet. App. 19).

Finally, the State misrepresents Arizona law when it urges this Court to deny the Petition so as not to be the "very first to address" the constitutionality of Arizona's statutes. (Br. in Opp'n 18.) In *Sanderson*, the Arizona Court of Appeals, explicitly relying on this Court's holding in *Patterson*, explained that Arizona Revised Statutes sections 13-1407(E) and 13-1410 "did not allocate the burden of proof on any element to the defendant but, rather, created an affirmative defense regarding motive. This is constitutionally permissible." 898 P.2d at 491. Indeed, the State cited *Sanderson* to the trial court *for this very proposition*. (*See* Pet. App. 50-51.) Having relied upon *Sanderson* to buttress its constitutional argument in the trial court, the State cannot now claim that no Arizona appellate court has ever before addressed the constitutionality of the statutes challenged in the Petition.

3. States Are in Conflict Regarding Whether Legislatures May Reduce the Government's Burden to Prove Illicit Intent in Molestation Cases.

Without the guidance of defined constitutional limits on their ability to manipulate burdens of proof, states have disagreed regarding the constitutionality of statutes that reduce the government's burden to prove illicit intent in child molestation prosecutions. (Pet. 18-20); *compare State v. Tibbetts*, 281 N.W.2d 499, 500-01 (Minn. 1979) (statute requiring proof that touching "can reasonably be construed as being" for a sexual or aggressive purpose unconstitutionally shifted the burden of proof), *with In re Wentworth*, 651 N.W.2d 773, 776 (Mich. Ct. App. 2002) (statute requiring proof that touching "can reasonably be construed as being" for a sexual purpose *did not* unconstitutionally shift the burden of proof). Rather than confront the merits of the conflicting rationales, the State maintains that the cases discussed are irrelevant because "the statutes at issue in the cases that Petitioner has cited contain language not found in Arizona's child-molestation laws." (Br. in Opp'n 30.) But whether the statutes at issue in *Tibbetts* or *Wentworth*, for instance, are identical to Arizona's statutes is unimportant. What is critical is that in each statutory scheme the legislature reduced the government's burden to prove the sexual part of a sex crime to something less than beyond a reasonable doubt. Reflecting the tension between *Apprendi* and *Patterson*, state courts are split

regarding whether such a reduction is constitutionally permissible.

"[T]here are obviously constitutional limits" on the powers of the states to "reallocat[e] burdens of proof." *Patterson*, 432 U.S. at 210. (Pet. 9.) The divergent cases – including most prominently this one – demonstrate the need for this Court to resolve the tension between *Apprendi* and *Patterson* and provide state legislatures and courts with much needed guidance.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, Appellee. v. STEPHEN EDWARD MAY, Appellant.	1 CA-CR 07-0144 Maricopa County Superior Court No. CR-CR2006- 030390-001 SE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court properly instructed the jury that the absence of sexual motivation was an affirmative defense to be proven by Appellant by a preponderance of the evidence, notwithstanding Appellant's contention that sexual motivation is an element of child molestation, as currently defined by A.R.S. § 13-1410(A).

* * *

ARGUMENTS

I

THE TRIAL COURT'S INSTRUCTIONS WERE CORRECT BECAUSE SEXUAL MOTIVATION IS NOT AN ELEMENT OF CHILD MOLESTATION, AND THE LACK OF SEXUAL MOTIVATION IS AN AFFIRMATIVE DEFENSE.

Appellant contends that the trial court's instructions: (1) unconstitutionally relieved the State of the burden of proving the alleged element of sexual motivation; and (2) impermissibly classified the lack of sexual motivation as an affirmative defense that he had to prove by a preponderance of the evidence. However, the version of A.R.S. § 13-1410 in effect when Appellant committed the instant offenses did *not* include sexual motivation among the elements of child molestation. Instead, A.R.S. § 13-1407(E) establishes lack of sexual motivation as an affirmative defense that the accused must prove by a preponderance of the evidence.

A. Pertinent Procedural History.

Appellant requested the trial court to instruct the jury that "the State is obligated to prove a motivation of sexual interest as an element of the offense." (R.T. 1/9/07, at 71-72.) Appellant further posited that the lack of sexual motivation was not an affirmative defense under A.R.S. § 13-103(B) because it established "lack of intent." (*Id.* at 72-73.) The trial court sustained the State's objection to these proposed instructions, based on its conclusion that sexual motivation is not an element of child molestation, but instead an affirmative defense. (P.I., Item 212; R.T. 1/10/07, at 98-99.) The trial court thus instructed the jury as follows:

> The crime of molestation of a child requires proof that the defendant knowingly touched, directly or indirectly, the genitals of a child under the age of 15. It's a defense to child molestation that the defendant was not motivated by sexual interest.
>
> The defendant has raised the affirmative defense of lack of sexual motivation with respect to the charged offense of child molestation. The burden of proving each element of the offense beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of lack of sexual motivation is on the defendant. The defendant must prove the affirmative defense of lack of sexual motivation by a preponderance of the evidence. If you find that the defendant has proved the

> affirmative defense of lack of sexual motivation by a preponderance of the evidence, you must find the defendant not guilty of the offense of molestation of a child.

(R.T. 1/10/07, at 107-08.)

Appellant subsequently challenged the propriety of these instructions in his unsuccessful motion for new trial. (P.I., Item 241; R.T. 2/17/07, at 7.)

B. Pertinent Legal Principles.

The decision to refuse a jury instruction is within the trial court's discretion, and the appellate court will not reverse absent a clear abuse of that discretion. *See State v. Bolton,* 182 Ariz. 290, 309 (1995). "In assessing the adequacy of jury instructions, the instructions must be viewed in their entirety in order to determine whether they accurately reflect the law." *State v. Hoskins,* 199 Ariz. 127, 145, ¶ 75 (2000). Moreover, "failure to give a certain instruction is not reversible error unless it is prejudicial to the rights of a defendant, and such prejudice will not be presumed but must appear from the record." *State v. Sierra-Cervantes,* 201 Ariz. 459, 464, ¶ 29 (App. 2001).

"A trial court does not err by refusing an instruction that is an incorrect statement of law." *State v. Barr,* 183 Ariz. 434, 443 n.3 (App. 1995). "If a defendant's requested instruction contains an error or misstatement of the law, it is not the duty of the trial court to correct that statement." *State v. Harris,* 107

Ariz. 41, 45 (1971). "When an instruction requested to be given is good in part and bad in part, the court is not required to separate the good from the bad, and the refusal to give such an instruction is not an abuse of discretion." *State v. Mitchell,* 204 Ariz. 216, 220, ¶ 22 (App. 2003). *Cf. State v. Valenzuela,* 114 Ariz. 81, 84 (App. 1977).

C. ARGUMENT.

Although the Fourteenth Amendment's Due Process Clause obligates the prosecution to prove every *element* of a criminal offense beyond a reasonable doubt, *see In re Winship,* 397 U.S. 358, 364 (1970), legislatures may constitutionally require the defendant to bear the burden of proving affirmative defenses and thereby relieve the prosecution of the burden of *negating* affirmative defenses beyond a reasonable doubt.[5] *See Martin v. Ohio,* 480 U.S. 228, 231-34 (1987); *State v. Casey,* 205 Ariz. 359, 362-63, ¶¶ 11-15 (2003); *State v. Farley,* 199 Ariz. 542, 545, ¶¶ 11-17 (App. 1999). Consequently, jury instructions affixing the burden of proving a defense upon the accused do not offend due process unless the criminal statute at issue requires the prosecution to disprove the asserted defense as an element of the crime. *See,*

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[5] "[A]n affirmative defense is a matter of avoidance of culpability even if the State proves the offense beyond a reasonable doubt." *State v. Jeffrey,* 203 Ariz. 111, 114, ¶ 10 (App. 2003).

e.g., Casey, 205 Ariz. at 366, ¶ 28; *Jeffrey,* 203 Ariz. at 114, ¶ 11; *Farley*, 199 Ariz. at 545, ¶¶ 14-17.

Given these principles, the threshold question is whether the defendant's sexual motivation is an element of child molestation that the State must prove beyond a reasonable doubt. Thus, this Court's analysis must begin with the language of A.R.S. §§ 13-1410 and -1407 because "the best and most reliable index of a statute's meaning is the plain text of the statute." *State v. Christian,* 205 Ariz. 64, 66, ¶ 6 (2003). "When the language of a statute is clear, it is determinative of the statute's construction." *State v. Thompson*, 200 Ariz. 439, 440, ¶ 6 (2001).

Under the version of A.R.S. § 13-1410(A) in effect at the time of Appellant's offenses, "[a] person commits molestation of a child by intentionally or knowingly engaging in . . . sexual contact . . . with a child under fifteen years of age." "'Sexual contact' means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body." A.R.S. § 13-1401(2) (2005). Finally, A.R.S. § 13-1407(E) provides, "It is a defense to a prosecution pursuant to § 13-1404 or 13-1410 that defendant was not motivated by a sexual interest."

Based upon the plain meaning of these statutes, this Court very recently not only reaffirmed its prior holding that sexual motivation is *not* an element of child molestation, but also held that the lack of sexual motivation is *an affirmative defense* that the

accused must prove by a preponderance of the evidence. *See State v. Simpson,* 2007 WL 4394845 *3, ¶¶ 17-19 (Ariz. App. Dec. 18, 2007). *Cf. State v. Getz,* 189 Ariz. 561, 563-66 (1997) (holding that statute defining sexual abuse under A.R.S. § 13-1404 must be applied "as written" because its text is "plain on its face," and refusing to "inject" any affirmative defense under § 13-1407 into the crime's elements); *State v. Sanderson,* 182 Ariz. 534, 542 (App. 1995) ("The statutes in question did not allocate the burden of proof on any element to the defendant but, rather, created an affirmative defense regarding motive."); *State v. Sandoval,* 175 Ariz. 343, 345-47 (App. 1993) (rejecting the argument that A.R.S. § 13-1407(E) renders sexual motivation an element of the indecent-exposure statute).

Because the trial court instructed the jury that the burden of proving every element of child molestation beyond a reasonable doubt "always remained on the State," R.T. 1/10/07, at 104, 107-08, the jury instructions requiring Appellant to prove the lack of sexual motivation by a preponderance of the evidence comported with due process. *See Casey,* 205 Ariz. at 366, ¶ 29; *Sierra-Cervantes,* 201 Ariz. at 461-63, ¶¶ 13, 22-24; *Farley,* 199 Ariz. at 545, ¶ 13.

Appellant, however, relies upon *State v. Brooks,* 120 Ariz. 458 (1978), and *State v. Turrentine,* 152 Ariz. 61 (App. 1986), to argue that the elements of child molestation still include proof that the acts involved were "motivated by an unnatural or abnormal sexual interest or intent with respect to

children." (OBR, at 14, nn. 75-76.) These two cases, however, are inapposite because they construed A.R.S. § 13-1410's differently worded predecessors, A.R.S. § 13-653 (repealed by Laws 1977, Ch. 142, § 66), and former A.R.S. § 13-1410 (amended by Laws 1993, Ch. 255, § 29). The differences in the statutory language between A.R.S. § 13-1410's current and antecedent versions very recently prompted this Court to reject another child-molestation defendant's argument that far more recent precedent than *Brooks* and *Turrentine – State v. Lujan,* 192 Ariz. 448 (1998), and *Maricopa County Juv. Action No. JV-121430,* 172 Ariz. 604 (App. 1992) – established sexual motivation an element of child molestation:

> Neither *JV-121430* nor *Lujan* construed the current version of A.R.S. § 13-1410, enacted in 1993, which differs from the previous version as the current version does not contain the language "knowingly molests." *See* 1993 Ariz. Sess. Laws, ch. 255, § 29. These cases are, therefore, not persuasive in construing the applicable version of the statute. Also, the current version of A.R.S. § 13-1410 makes molestation of a child a crime if a person "intentionally or knowingly engag[es] in . . . sexual contact . . . with a child under fifteen years of age." Nothing in either *JV-121430* or *Lujan* compels this court to interpret the A.R.S. § 13-1410, as amended, to require proof of "sexual interest" as an element of the offense.

Simpson, at *4, ¶ 22 (footnotes omitted).

Nonetheless, Appellant maintains that the State must prove lack of sexual motivation as an element of child molestation, for three reasons: (1) the lack of sexual motivation is a "legal defense," as defined in *United States v. Cameron,* 907 F.2d 1051, 1063 (11th Cir. 1990), because it negates the "specific intent" element of Arizona's child-molestation statute, as manifested by "case law" (*Brooks* and *Turrentine*); (2) A.R.S. § 13-1407(E) identifies lack of sexual motivation as a "defense," not an "affirmative defense"; and (3) A.R.S. § 13-103(B)'s definition of "affirmative defense" excludes "any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification, or *lack of intent.*" (OBR at 13-15; emphasis added.) Besides being foreclosed by *Simpson's* sound reasoning and correct application of the rules of statutory construction, Appellant's argument suffers from several additional fatal flaws.

First, Appellant's reliance upon *Brooks* and *Turrentine* is misplaced because these cases construed two former and differently-worded versions of A.R.S. § 13-1410. Because the present child-molestation statute's plain text does *not* include the requirement that the act be motivated by an unnatural or abnormal sexual interest with respect to children, this Court may not rely upon common-law to engraft into A.R.S. § 13-1410 elements that the Legislature did not see fit to include. *See State v. Miranda,* 200 Ariz. 67, 69, ¶ 5 (2001); *State v. Ramsey*, 211 Ariz. 529, 538, ¶ 28 n.5 (App. 2005); *Vo v. Superior Court in*

and for County of Maricopa, 172 Ariz. 195, 202 (App. 1992).

Appellant's reliance on A.R.S. § 13-103(B)'s definition of "affirmative defense" is equally misplaced. According to Appellant, "lack of sexual motivation" does not qualify as an affirmative defense under the statutory definition because the absence of sexual motive allegedly establishes "lack of intent" and thereby negates the child-molestation statute's *mens rea* element. The fundamental defect dooming this argument is its mistaken assumption that the *motive* to commit a crime and criminal *intent* are synonymous:

> Motive and intent are in no sense synonymous. They mean two different things. . . . Motive is the moving cause which induces action; it has to do wholly with desire. Intent is the purpose or design with which an act is done, and involves the will. . . . Motive is not an essential ingredient of crime; intent is always so, whether the offense be of common-law or statutory origin.

State v. Hughes, 125 S.W.2d. 66, 70 (Mo. 1939) (citations omitted); *see also Lee v. City of Los Angeles,* 92 F.3d 842, 850 (9th Cir. 1996); *Craun v. State*, 762 N.E. 230, 237 n.11 (Ind. App. 2002); *State v. Ruebke,* 731 P.2d 842, 852 (Kan. 1987); *People v. Hoffman,* 570 N.W.2d 146, 148 (Mich. App. 1997); *State v. Bronson,* 496 N.W. 882, 890 (Neb. 1990); *People v. Weiss,* 300 N.Y.S. 249, 255 (1937); *Snakenberg v. Hartford Cas. Ins. Co.,* 383 S.E.2d 2, 7 (S.C. App. 1989); *State v.*

Powell, 893 P.2d 615, 624-25 (Wash. 1995); BLACK'S LAW DICTIONARY 1014 (6TH ED. 1991).

Although proof of Appellant's sexual motivation might have helped the State persuade the jury that Appellant entertained the *mens rea* to commit child molestation, lack of sexual motivation remains a valid affirmative defense under A.R.S. § 13-103(B) because criminal intent is not negated by the lack of criminal motive. *Cf. State v. Williams,* 183 Ariz. 368, 376 (1995); *State v. Rivera,* 152 Ariz. 503, 517 (1987).

Finally, the fact that A.R.S. § 13-1407 is entitled "defenses" instead of "affirmative defenses" does *not* support Appellant's argument that subsection (E)'s "lack of sexual interest" merely establishes a "legal defense" that the State must disprove. This argument overlooks the fact that Arizona courts have repeatedly classified statutory exceptions to criminal liability, both in A.R.S. § 13-1407 and other statutes, as "affirmative defenses," even when the statutory provision at issue contains no language expressly knighting its exception with the "affirmative defense" nomenclature. *See Getz,* 189 Ariz. at 565; *Simpson,* at *3, ¶ 19; *State v. Young,* 192 Ariz. 303, 306-07, ¶¶ 9-16 (App. 1998); *Sanderson,* 182 Ariz. at 542); *State v. Berryman,* 178 Ariz. 617, 621 (App.1994).

Equally detrimental to Appellant's argument, that the State had to prove sexual motivation as an element of child molestation, is the fact that the Legislature promulgated the "lack of sexual motivation" exception in a separate statute, A.R.S.

§ 13-1407(E), and did not expressly include sexual motivation among the elements listed in A.R.S. § 13-1410(A). *See State v. Eagle,* 196 Ariz. 188, 191, ¶ 10 (2000); *State v. Hollenback,* 212 Ariz. 12, 14-15, ¶ 5 (App. 2005).

Even if the lack of sexual motivation were not an "affirmative defense," it would instead constitute a statutory exception for conduct otherwise falling within the scope of the child molestation statute. This alternative classification would be a distinction without a practical difference for this case's outcome because "[a] defendant who relies upon an exception to a criminal statute made by a proviso or distinct clause has the burden of establishing and showing that she comes within the exception." *In re Maricopa County Juvenile Action No. JT9065297,* 181 Ariz. 69, 82 (App. 1994). Stated differently, the inapplicability of a statutory exception is not an element that the State must prove. *See, e.g., State v. Kelly,* 210 Ariz. 460, 463, ¶ 11 (App. 2005); *In re Roy L.*, 197 Ariz. 441, 447, ¶ 19 (App. 2000); *Berryman*, 178 Ariz. at 621-22; *State v. Jung*, 19 Ariz. App. 257, 262 (1973); *State v. Quandt*, 17 Ariz. App. 33, 34 (1972).

Finally, Appellant in this hypothetical construct would still have the burden of proving his lack of sexual motivation "by a preponderance of the evidence" under A.R.S. § 13-202(A) because a statutory exception "functions similarly to an affirmative defense," and a contrary rule would "infuse[ ] unnecessary confusion into Arizona law by announcing an inconsistent burden or standard of proof for

exceptions." *Kelly*, 210 Ariz. at 464, ¶ 15; *see also State v. Grell*, 212 Ariz. 516, 522, ¶ 26 (2006) (requiring capital defendant at sentencing to bear burden of proving mental retardation, which "is like proof of an affirmative defense in that it serves to relieve or mitigate a defendant's criminal responsibility").

Thus, the trial court neither abused its discretion nor violated the Due Process Clause because it correctly instructed the jury on the elements of child molestation and properly placed on Appellant the burden of proving the lack of sexual motivation as an affirmative defense. *See Jeffrey*, 203 Ariz. at 114, ¶ 12.

Even assuming that the trial court's instructions on the burden of proof for the lack of sexual motivation were somehow deficient, any error would be harmless because Appellant was not entitled to an instruction concerning a lack of sexual interest in the first instance. *See State v. Rhymes*, 129 Ariz. 56, 59-60 (1981); *State v. Buggs*, 167 Ariz. 333, 337 (App. 1990). Appellant *never* admitted at trial that he had ever touched the genitalia of Luis, Taylor, and Danielle. Indeed, Appellant testified that he could not remember any one-on-one time with Luis in the classroom. (R.T. 1/10/07, at 43-44.) Moreover, Appellant made no post-arrest statements at all about Luis, unequivocally denied touching Danielle inside the swimming pool, and denied the possibility of even accidentally touching Taylor's vagina while throwing her into the water. (R.T. 1/8/07, at 90-93.) Appellant

testified only that it was *possible* that he touched the vaginas of Taylor and Danielle in the pool, and characterized such possible contact as unintentional, unknowing, accidental, and without sexual interest. To merit an affirmative defense instruction, a defendant must admit to engaging in the charged assaultive conduct. *See State v. Williams,* 132 Ariz. 153, 156 (1982); *State v. Gilfillan,* 196 Ariz. 396, 407, ¶ 41 (App. 2000); *State v. Miller,* 129 Ariz. 42, 43 (App. 1981).

Finally, even if the jury instructions erroneously required Appellant to prove the absence of sexual motivation by an improperly elevated preponderance-of-the-evidence standard, Appellant offered insufficient evidence to create a reasonable doubt that he lacked sexual motivation when he touched the girls' vaginas in the pool. Consequently, any error would be harmless. *See State v. McKeon,* 201 Ariz. 571, ¶¶ 22-31 (App. 2002) (erroneous instruction on voluntary intoxication was harmless because even a properly instructed jury would have rejected this defense); *State v. Tamplin,* 195 Ariz. 246, ¶¶ 12-14 (App. 1999) (instruction incorrectly defining insanity was not fundamental error because the evidence supporting this defense was insufficient).

* * *

CONCLUSION

Based on the foregoing authorities and arguments, Appellee respectfully requests that this Court affirm the trial court's judgments and sentences.

Respectfully submitted,

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